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REPORTS

OF

CIVIL AND CRIMINAL CASES

DECIDED BY THE

COURT OF APPEALS

OF KENTUCKY.

VOLUME VII.

T. R. McBEATH, REPORTER.

**VOLUME 114, KENTUCKY REPORTS,
CONTAINING CASES DECIDED FROM OCT. 21, 1902, TO FEB. 26, 1903.**

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GEO. G. FETTER COMPANY.
1904.**

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DECISIONS
OF THE
Court of Appeals of Kentucky.

SEPTEMBER TERM, 1902.

CASE 1—ACTION BY VICTOR C. REISER TO RECOVER DAMAGES FOR PERSONAL INJURIES.—OCTOBER 21.

Reiser v. Southern Planing Mill & Lumber Company.

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APPEAL FROM JEFFERSON CIRCUIT COURT, LAW AND EQUITY DIVISION.

JUDGMENT FOR DEFENDANT AND PLAINTIFF APPEALS. AFFIRMED.

INJURY TO EMPLOYE—DEFECTIVE MACHINE—PROMISE TO REPAIR—
KNOWLEDGE OF SERVANT—ASSUMPTION OF RISK—LIABILITY OF
MASTER—CONTRIBUTORY NEGLIGENCE.

- Held: 1. A servant is not exonerated from the duty of exercising ordinary care for his own safety from the use of defective machinery, of which he had knowledge, because of a promise of the master to repair such defects.
- 2 While the law imposes on the master the duty to provide suitable machinery for the use of the servant, if the servant has knowledge that the machinery is defective and he continues to use it without complaint he assumes the risk therefrom and waives the right to hold the master liable in case of injury.
3. If, however, the servant does complain and the master promises to repair the machinery in a reasonable time, then the master can not rely upon the knowledge of the servant of the defective condition of the machinery so as to relieve himself from responsibility, but this principle does not go to the extent of holding the master liable for an injury which results from the negligence of the servant, and not from the defect in the machinery.

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Reiser v. Southern Planing Mill & Lumber Co.

MATT O'DOHERTY, BENNETT H. YOUNG AND MARION W. RIPPY, FOR APPELLANT.

We urge but one error of the trial court in this appeal and that was the failure to instruct the jury along the lines of instruction No. 1, offered by appellant, which is as follows: "The court instructs the jury that the law made it the duty of the defendant to observe ordinary care to have and maintain the machine upon which plaintiff was working in its service when injured, in a condition reasonably and adequately safe and sufficient for the use of the plaintiff and if the jury shall believe from the evidence that the said machine was not in such adequately and reasonably safe condition, and shall further believe that the plaintiff called the attention of the defendant's foreman in charge of the shop in which he was working, to the condition of said machine, and that he, plaintiff, was assured or promised by said foreman that said machine or the defects, if any, therein, would be repaired within a reasonable time, and if the jury shall further believe that the plaintiff relied upon the promise or assurances so given, if so given, and that within such time thereafter as was reasonable to allow for the performance of said promise, plaintiff received the injuries by him alleged, by reason of and because of the defective condition of said machinery, then the jury should find for the plaintiff."

There is no question in this case that appellant knew of the dangerously defective condition of the machine, for he had complained to his superiors and told them of its condition and they had both promised to repair it or replace it with a new one in a few days. Appellant acted on this promise as he had a right to do and continued to use it, but within two days thereafter he met with this accident.

We claim that we were entitled to have this case submitted to the jury by an instruction along the lines indicated in the one we offered, and we insist that in the instructions given the trial court erred to our prejudice.

AUTHORITIES CITED.

Brown v. Levy, 20 R., 1726; Shearman & Redfield on Neg., 5 ed., sec. 215; Beech on Contributory Negligence, 372; Breckinridge Co. v. Hicks, 94 Ky., 362; Earl Fruit Co. v. Curtis, 116 Cal., 162; Jackson Shook, 7 W. P. v. Shera, 8 Ind. App., 330; Bailey v. Tygart Val. Iron Co., 10 R., 676; Gamble v. Mullin, 74 Ia., 99; Eureka Fertilizer Co. v. Baltimore Export Co., 78 Ind., 179; Henning v. Globe Foundry Co., 112 Mich., 616; Levy v. Cunningham, 56 Neb., 348; Patterson v.

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Westchester Elec. Ry. Co., 49 N. Y., 796; Holmes v. Whitaker, 24 Ore., 319; Chappell v. Trent, 90 Va., 849.

FRED FORCHT, JR. AND FORCHT & FIELD, ATTORNEYS FOR APPELLEE.

The machine upon which appellant was injured was not complicated; the dangers connected with its operation were as plain as the nose on a man's face, and where the danger is so obvious and palpable the servant assumes the risk notwithstanding the promise to repair. In this case there was a general promise to repair but no time fixed in which to make the repairs. The instructions given were fair and impartial, and the jury must have found from the evidence that appellant was not exercising ordinary care for his own safety at the time he was injured.

AUTHORITIES CITED.

Shearman & Red. on Neg., vol. 1, sec. 215; Dist. of Columbia v. McElligott, 117 U. S., 632; McKelvey v. Ry. Co., 35 W. Va., 500; Marsh v. Chickering, 101 N. Y., 396; Corcoran v. Gas Co., 81 Wis., 191; Meador v. Lake Shore Co., 138 Ind., 290; St. L. & R. Co. v. Kelton, 55 Ark., 483; Standard Oil Co. v. Helmick, 148 Ind., 457; Ind., &c. R. R. Co. v. Watson, 114 Ind., 30; Conroy v. Vulcan Iron Works, 62 Mo., 35; Hough v. Ry. Co., 100 U. S., 213; Weber v. Piper, 38 Hun., 353; Ft. Wayne J. & S. R. Co. v. Gildersleeve, 33 Mich., 133; Union Mfg. Co. v. Morrissey, 40 Ohio St., 143; Sweeney v. Envelope Co., 101 N. Y., 520; Hannagan v. Smith, 28 App. Div., 176; 50 N. Y. S., 845; McCormick Har. Machine Co. v. Liter, decided February 19, 1902, see 23 R., 2154.

OPINION OF THE COURT BY JUDGE BURNAM—AFFIRMING.

The appellant, Victor Reiser, an infant, instituted this action by William Reiser, his next friend, against the appellee, the Southern Planing Mill & Lumber Company, to recover damages for the loss of three fingers from his left hand. He alleged in his petition "that whilst he was running a board over the knives of a joiner in defendant's planing mill his left hand came in contact with the knives of said joiner, and three fingers of his left hand were cut off; that the accident was due to the fact that the knives were

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dull, and unfit for the purpose for which they were being used, which fact was known to the defendant; that shortly before the accident he complained to the defendant and its officers and agent and employes, and gave them notice of the dangerousness, dullness and defectiveness, and unfitness of the aforesaid knives, and that they then and there promised to provide good, sharp, new and safe knives within a reasonable time for said joiner, which they failed to do; that, relying upon this promise, he continued to work for several days, and by reason thereof received the injury complained of." By amended petition he alleges "that the joiner which he was engaged in operating when the injury occurred was at the time in a defective and dangerous condition, and that he complained of it shortly prior to his said injury, calling the attention of the defendant's officers and agents in charge of said planing mills, and superior to plaintiff in defendant's service, and whose duty it was to inspect and repair said machine, to its condition; that the defendant, by said officer and agents, promised to repair the same; and that, relying on said promise, he remained in the defendant's service, and continued to operate said machine, and was so operating it when injured, and within a reasonable time after the making of said promise to allow for its performance; that the injuries complained of in his petition were caused by reason and because of the defective and dangerous condition of said machine, and by the gross negligence of the defendant in having said machine in such defective condition, and in failing to repair same." These allegations were controverted in the answer, and a general plea of contributory negligence relied upon. The testimony in the case shows that appellant Reiser was 19 years of age, and that he had been in the employ of the appellee in its planing mills for about three years, and that

he had been in charge of and working upon the joiner which is complained of for about a year and a half. He testified that the blades were dull, and that two or three days before the accident he asked the appellee's agent, whose duty it was, to sharpen them, who informed him that they could not be sharpened any more, that they were too short, that the company would have to get new ones; and that he also notified Olaf Anderson, the boss in charge of the shop, that he would not work on the machine unless it was fixed up, and that he told him to go ahead and work on it, that it would be fixed in a couple of days; and that, relying upon this promise, he continued to operate the machine; that a few days after this conversation, whilst he was running a board over the joiner, the bits threw the board over, and his hand slipped on the knives; and that the jumping of the board was because the knives were dull and out of fix. And his testimony as to the dullness of the knives was corroborated to some extent by the testimony of Welsh, who was put in charge of the machine after his injury. On the other hand witnesses for the defendant testify that the machine was in good order, and that there was nothing wrong with the knives or bits at the time of the accident; that the knives were sharp, but that, even if they had been dull, as testified to by appellant, it would not have occasioned the injury; that the board would have slipped over them without making any kind of cut; that another man was put in charge of the machine immediately after the accident to the appellee, without any change having been made therein, and that it worked all right. And Anderson, the boss, denies that plaintiff had made any complaint to him about the joiner not being in good condition. At the conclusion of the evidence the plaintiff asked the court to give the following instruction to the

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jury. "The court instructs the jury that the law made it the duty of the defendant, the Louisville Planing Mill Company, to observe ordinary care to have and maintain the machine upon which the plaintiff was working in its service when injured in a condition reasonably and adequately safe and sufficient for the use of the plaintiff, and if the jury shall believe from the evidence that said machine was not in such adequately and reasonably safe condition, and shall further believe that the plaintiff called the attention of the defendant's foreman in charge of the shop in which he was working to the condition of the said machine, and that he (the plaintiff) was assured or promised by said foreman that the said machine, or defects, if any, therein, would be repaired within a reasonable time; and if the jury shall further believe that the plaintiff relied upon the promise or assurance so given, if it was given, and that within such time thereafter as was reasonable to allow for the performance of said promise the plaintiff received the injuries by him alleged by reason and because of the defective condition of said machine—then the jury should find for plaintiff,"—which the trial court refused, but in lieu thereof instructed the jury as follows: "(1) It was the duty of the plaintiff, when he accepted employment from the defendant, to exercise ordinary care for his own safety, and not knowingly to expose himself to unnecessary risks or dangers connected with his said employment. And the court instructs the jury that the plaintiff, when he accepted employment from the defendant to operate the machine known as a 'joiner,' assumed all the risks incident to such employment; that is, such risks as naturally arose out of, or were necessarily connected with, said employment. But he did not assume risks that were unknown to him, and which were

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not incident to his employment, nor such risks which the defendant could, by the exercise of ordinary care, have guarded against. (2) The court instructs the jury that it is the duty of the defendant, the Southern Planing Mill & Lumber Company, when it employed the plaintiff, to exercise ordinary care in providing him with a reasonably safe machine or joiner; that is, one in good order, and fitted for the purpose and work for which it was intended. It was also the duty of the defendant to exercise ordinary care in keeping the same in reasonably safe condition for the use of the plaintiff while he was so engaged in operating the said machine. (3) The court instructs the jury that if they believe from the evidence that the injury of the plaintiff complained of was caused by the failure on their part to perform its duties as defined in instruction No. 2, then the law is for the plaintiff, and the jury should so find, unless the jury shall believe from the evidence that the plaintiff himself failed to perform his duty, as defined in instruction No. 1, and that for such failure on his part the accident would not have happened; in which latter event the law is for the defendant, and the jury should so find. (4) The court instructs the jury that if they believe from the evidence that the injury of the plaintiff complained of in his petition was not the result of any defect in the machine joiner, but was the result of a risk or danger as naturally arose or grew out of the plaintiff's employment, and was naturally attended upon said employment, then the law is for the defendant, and the jury should so find. (5) The court instructs the jury that if the injury complained of was not the result of a risk or danger incident to said employment, but could have been prevented by the exercise of ordinary care on the part of the defendant in the performance of its

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duty, as defined in instruction No. 2, then the law is for the plaintiff, and the jury should so find, unless the jury shall also believe from the evidence that by the exercise of ordinary care on his part the plaintiff could have prevented said injury; in which latter event the law is for the defendant, and the jury should so find."

The trial resulted in a verdict and judgment for the defendant, and we are asked to reverse the case because of the failure of the trial court to give the instruction offered by the plaintiff; and the contention is made that, when an employe has notified a master that a machine upon which he is employed is not in good condition, and objected to continuing work thereon, and is induced to do so by a promise to repair the machine within a reasonable time, that for such time the employe assumes no risk from its operation; that the master, in effect, during this interval, guaranties the employe against any and all injury resulting from the operation of such machine. This contention is based upon the principle of law which is very clearly defined in *Sherm. & R. Neg.*, (5th Ed.), section 250, in these words: "There is no longer any doubt that, where a master has expressly promised to repair a defect, the servant does not assume the risk of an injury caused thereby within such a period of time after the promise as would be reasonable to allow for its performance, or, indeed, within any period which would not preclude all reasonable expectation that the promise might be kept.

. . . And the same principle applies to a case where the master promises to the servant to discharge an incompetent fellow servant, but fails to do so, and the foreman is thereby injured,"—and which has been frequently approved and applied by this court. In the case of *Breckinridge Co. v. Hicks*, 94 Ky., 362 (15 R., 143) 22 S. W., 554, 42 Am.

St. Rep., 361, a miner called the attention of the mining boss to loose rocks in the roof of the room where he was working, and the boss promised to send in timber and prop the roof. Two days after this promise the roof fell upon the miner, crippling him for life. In that case the court, speaking through Judge Pryor, said: "It will be assumed in this case that both the employer and employe knew of the danger, or from the facts had the right to apprehend it. Then the question arises, did Hicks waive the danger, and voluntarily assume to work, without looking to the employe for these props? If Hicks, knowing the danger, continued in his work without complaint, or rather without requiring his superior to provide these props, then he can not recover. If, however, the superior is notified of the danger, and of the necessity for these props, and promises to furnish them within a reasonable time, then the workman may continue his work, and will not be adjudged to have waived the right of exacting this duty of his superior by remaining a reasonable time in the service. . . . And there seems to us to be no valid reason for determining that such conduct is a waiver of the right of recovery, when, if the superior had complied with his promise, no injury would have been inflicted."

In *Brown v. Levy* (108 Ky., 163) (21 R., 1724) (55 S. W., 1079) the plaintiff alleged "that he was injured by reason of the incompetency of a fellow servant, and that he had notified his employer that said fellow servant was incompetent and negligent, and they knew when they employed him that he was careless and negligent, and had promised that they would in a short time remove him, and employ a competent assistant." That case came up on demurrer, and it was held, in substance, that the servant could not be held to assume the risk of an injury by the

negligence of a fellow servant after complaining thereof, and after promise to remove such servant. And in *Bell & Coggeshall Co. v. Applegate* (23 R., 470) (62 S. W., 1124) the principle of law which the appellant seeks to have applied was considered, and the rule stated in these words: "The rule with reference to machinery and appliances to be used by the employe in the discharge of his duties is that, where the master is notified by the servant of a defect in the machinery furnished for the servant's use, and promises to remedy the defect, the servant, by continuing in the use of such machinery for a reasonable time after the promise to repair, does not assume the risk; and if, by reason of the defect complained of, he is injured, the master is liable." But there is no intimation by either *Shearman & Redfield* or any of the cases referred to, nor do we understand the law to be, that a servant is exonerated from the duty of exercising ordinary care for his own safety from the use of defective appliances, of which he had knowledge, because of a promise of the master to repair such defects. The law imposes upon the master the duty to use ordinary care to provide suitable machinery for the use of his servant; but the law is well settled that if the employe has knowledge that the machinery with which he is to work is in a defective condition, and he continues to use it without complaint, he assumes the risk therefrom, and waives the right to hold the master responsible in case of injury. But if, on the other hand, he does make complaint to the master, and the master promises that he will have the machine put in order within a reasonable time, then the master can not rely upon the knowledge on the part of the servant of the defective condition of the machine, so as to relieve himself from responsibility. But this prin-

Best, &c. v. Robinson, &c. (two cases.)

ciple of law does not go to the extent of holding the master liable for injuries which result from the negligence of the servant, who is at all times bound to exercise reasonable care for his own safety, and not from the defect in the machinery. The jury were not told that plaintiff could not recover if he was aware of the defective condition of the machinery, and there was consequently no occasion to tell them that, if he notified appellee of its defective condition, and they promised to repair it, they had waived their right to rely upon appellant's knowledge of the defective condition of the machinery to avoid recovery. We are of opinion that the instruction quoted supra submitted to the jury the real issues raised by the pleadings; that is, whether appellant's injury was the result of the defective condition of the joiner or negligence on the part of appellant.

Judgment affirmed.

CASE 2.—ACTION OF LIZZIE BEST, &C., AGAINST J. S. ROBINSON, &C., AND WILLIAM H. BEST, &C., AGAINST SAME DEFENDANTS, INVOLVING LIABILITY OF A COUNTY JUDGE AND SURETIES ON HIS OFFICIAL BOND FOR FAILING TO TAKE SUFFICIENT SURETY ON GUARDIAN'S BOND. TWO CASES HEARD TOGETHER. OCT. 21.

Best, &c. v. Robinson, &c. (two cases.)

APPEAL FROM GARRARD CIRCUIT COURT.

JUDGMENT FOR DEFENDANTS AND PLAINTIFFS APPEAL. REVERSED.

COUNTY JUDGES—LIABILITY FOR FAILING TO TAKE SUFFICIENT SURETY ON GUARDIAN'S BOND.

1. Kentucky Statutes, sec. 2017, requires a guardian to execute a bond before acting; and section 2018 provides that if the court fails to take such covenant, or accepts such sureties as

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do not satisfy it of their sufficiency, the judge so in default and his sureties shall be liable to the ward for any damages he may sustain thereby. *Held* that, though the judge is only required to use reasonable care to ascertain that the sureties are sufficient, he is absolutely bound to know that surety of some kind to the covenant is actually taken, and, if he accepts a bond to which the signature of the surety has been affixed under a power of attorney not legally authenticated, he is liable for resulting damages.

WILLIAM HERNDON, ATTORNEY FOR APPELLANTS.

These two actions were brought by appellants, by their guardians, against J. S. Robinson, the former county judge of Garrard county, on his official bond for money misappropriated by one Galloway, former guardian for appellants, who was allowed by the county judge to qualify and take possession of the wards' money without executing a proper bond therefor.

Galloway, the former guardian, pretended to have a power of attorney from his father, authorizing him to sign his father's name to his bond as guardian, which the county judge accepted. After the death of the guardian, J. G. Galloway, suit was brought against Frank Galloway, the surety on said bond, for the money owing to the wards, to which the surety filed a plea of *non est factum* to the bond, which was sustained by the court and the action dismissed as to the surety. Judgment was obtained against the administrator of J. G. Galloway, former guardian, and execution issued thereon, which was returned "no property found," and these suits were brought on the bond of the county judge, alleging that the loss of this money was due to the want of care in said officer in taking said bond.

Our contention is that the lower court by its instructions virtually took the case from the jury, and we insist that the jury should have been permitted to say by their verdict whether or not Frank Galloway executed or did not execute the power of attorney, and should not have been authorized by the instructions to find for the appellee upon his mere belief upon inquiry or upon great vigilance that Frank Galloway had executed it. It is the duty of the county judge to know that he has taken a bond and that the person who signs it is the person he represents himself to be, and that the signature to a bond or a power of attorney is not a forgery. The instructions permitted the jury to find for appellee, even if the power of attorney was a forgery, if the judge believed it was genuine. We claim that this was error.

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AUTHORITIES.

Kentucky Statutes, secs. 2018 and 2017; Com. for &c. v. Netherlands, 87 Ky., 195.

J. E. ROBINSON & ROBERT HARDING FOR APPELLEES.

It is proven in these cases by the judge and clerk of the county court, that the clerk prepared the power of attorney in the usual form, authorizing J. S. Galloway to sign Frank Galloway's name to the bond as surety. This power of attorney was taken away by the guardian and brought back to the judge duly executed by the surety, Frank Galloway, before an officer with his seal of office affixed. By virtue of this power, J. G. Galloway signed Frank Galloway's name to the bond. This paper was put in the record book but disappeared from the clerk's office and was lost.

We claim that the instructions given by the lower court were right.

The first one directs the jury to find for Robinson, if they believe that Frank Galloway executed and delivered the power of attorney to his son.

The second one allowed the jury to find for appellee, even if the power of attorney was a forgery, provided it was duly executed and that appellee believed in good faith it was genuine and exercised reasonable care and prudence to ascertain its genuineness before accepting it.

OPINION OF THE COURT BY JUDGE HOBSON—REVERSING.

These two cases, involving identically the same questions, will be disposed of together. Appellants are infants. In September, 1893, J. G. Galloway was appointed their guardian, and qualified in the Garrard county court. He died insolvent, owing his wards a balance. Suit was filed upon his bond as guardian against the surety in the bond, Frank Galloway, who was his father. The surety's name had been placed to the bond under a power of attorney, and he pleaded that it was not his act or deed. The case was tried, and, on final hearing, judgment was given in favor of the surety on this plea. The wards then filed these actions against the county judge and his sureties on his official bond to recover for his failure to take the

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proper bond of their guardian. He controverted the allegations of the petition, and on final hearing a verdict was rendered in his favor, on which judgment was entered. On the trial, Frank Galloway testified that he did not sign the power of attorney, or know anything about it until after the death of his son J. G. Galloway. The county judge testified that J. G. Galloway first came and offered to sign his father's name to the bond; that he refused to accept it, and told Galloway either to bring his father, or a power of attorney, duly executed, authorizing him to sign his father's name, instructing him to have his father go before some officer of the law and execute a power of attorney; that Galloway came back soon afterwards with a power of attorney, in regular form, executed before a magistrate or a clerk or deputy clerk, attested by the officer, with his seal of office on it; that it was signed by Frank Galloway making his mark, and attested by an officer, with his seal attached. J. G. Galloway executed the bond and signed his father's name as surety by himself, as attorney in fact, under the power of attorney. He also stated that a few months afterwards Frank Galloway came to his office and thanked him for permitting him to send the power of attorney, as it saved him a long ride. On cross-examination he admitted giving the following testimony in the suit on the guardian's bond, when the surety pleaded *non est factum*: "Ques. Did you take the paper out of Mr. Wherritt's hand, or did he give it to you? Ans. He read it to me. Ques. Then, if I understand you, you did not read the power of attorney yourself at all? Ans. I did not take it out of Mr. Wherritt's hand. Ques. How was that power of attorney signed? Ans. As I stated, I don't remember; my impression, my recollection, is it was executed before an officer at Kirks-

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ville, probably a magistrate. Ques. Had Frank Galloway signed that paper himself? Ans. I can't say. It was witnessed by some one, and, my impression, before an officer. Ques. Now, you are positive it was before an officer? Ans. My recollection is it was taken before an officer. I told you that I did not have it in my hands; it was read to me. Ques. If you did not see the paper, how do you arrive at the conclusion that it was signed and witnessed? Ans. From the reading of the clerk. I saw the power of attorney in Wherritt's hands as he read it. I saw the seal of the officer on it. My recollection is that Mr. Wherritt brought Frank Galloway to my office when he made me the visit, thanking me for not requiring him to come in person to sign the bond. Ques. What was Mr. Frank Galloway's business in your office the time which you speak of? Ans. He had no business except what I stated. He did not tell me of anything else." The clerk, Wherritt, was also introduced, and stated as follows: "My name is Thom. Wherritt, and I was clerk of the Garrard county court from 1882 up to January 1, 1895. I was clerk of said court when the guardian bond of J. G. Galloway as guardian of Lizzie and William Humphrey Best was executed. Mr. J. G. Galloway came down and wanted to sign his father's name as surety, and the judge required a power of attorney of him, authorizing him to do so. I either prepared the power of attorney, or told him how it should be prepared. I do not remember how it read or how it was signed. It was in the usual and regular form. Mr. Galloway came in my office with it, and executed the bond, and signed his father's name as surety. The power of attorney was placed in the bond book by me, and I have never looked for or seen it since, that I remember of. I don't remember whether it was pasted in the

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book, or placed in loose. They were generally pasted in. . . . Either just before I retired from office, or just after, a gentleman was introduced to me in the clerk's office as Frank Galloway. I never saw him before, and have never seen him since. It was shortly after the bond was executed, and I think he wanted to go to see Judge Robinson, and I took him to the judge's office." The power of attorney was lost, and could not be produced on the trial. There was also evidence conducing to show that Frank Galloway did not leave home or go to Lancaster within a number of years after the bond was executed, that he lived in Madison county, and that his son J. G. Galloway had never spoken to him about going on the bond. On these facts the court instructed the jury as follows: "Gentlemen of the jury: It appears that the name of Frank Galloway was signed in the guardian bond by J. G. Galloway. In order to bind Frank Galloway, it was necessary that he should have given to J. G. Galloway written authority to sign his name as surety to the bond, and this written authority must have been signed by Frank Galloway by writing his own name, or, if he did not sign his own name, by making his mark or sign, in the presence of at least one credible attesting witness. Now, if you believe from the evidence that J. G. Galloway did not have such written authority from Frank Galloway, but notwithstanding this fact the defendant J. S. Robinson failed to exercise a reasonable care and diligence to inform himself of this fact, and accepted the bond, and that by reason of this fact any personal estate or money which came to the hands of J. G. Galloway as guardian was lost to plaintiff, Lizzie Best, then you will find for plaintiff in damages, the criterion of which is the estate which is lost. Your verdict, if it be

for plaintiff, can not exceed \$495.10, the amount claimed in the petition. No. 2. If you believe from the evidence that defendant, in accepting the bond, exercised that degree of care and prudence which a reasonably prudent business man would have exercised in providing surety for his own debt or property, then you will find for defendant."

Section 2017, Kentucky Statutes, requires a guardian to execute bond before acting. Section 2018 then provides: "If the court fails to take such covenant or accept such person or persons as surety as do not satisfy it of their sufficiency, the judge so in default and his sureties shall be jointly and severally liable to the ward for any damages he may sustain thereby." It will be observed that the judge and his sureties are made liable to the ward for any damages he may sustain, "if the court fails to take such covenant." In *Daniels v. Vertrees*, 69 Ky., 4, the name of one of the wards was omitted from the bond and so no bond was taken to this ward, as the surety was not bound beyond the undertaking of his covenant. The county judge and his sureties were held liable, notwithstanding the order of the court by which the guardian was appointed recited that a bond was executed. In *Com. v. Netherland's Adm'r*, 87 Ky., 195 (10 R., 123) (8 S. W., 272), the county judge allowed the name of the surety to be signed to the bond by the principal upon his statement that he had the verbal authority of the surety to sign his name to it. The court, after pointing out that the second clause of section 2018, relating to the solvency of the surety only, required the county judge to use reasonable diligence in ascertaining whether the surety was sufficient, said: But the first clause made the judge liable to the ward if he failed to take the covenant, with surety, from

the guardian. The simple failure to take surety was made sufficient to hold the judge liable for any damage that the ward might sustain by reason of such failure. Under the second clause he could be heard to excuse himself for taking insufficient sureties, upon the ground that he, after exercising reasonable diligence, satisfied himself that the sureties were sufficient, because it would be unreasonable to require him to ascertain the fact as to the sufficiency of the sureties with absolute certainty. Hence said clause required him to exercise reasonable diligence only. But requiring him to know that surety to the covenant was actually taken was, not unreasonable, for the reason that he could do so with absolute certainty; for he could require the surety to sign the covenant in person and in his presence, or he could require the surety to authorize the signing of his name by a written power of attorney, authenticated in such a manner as to leave no doubt of its authenticity. This could be done without any material inconvenience to the guardian, surety or judge. Hence the first clause required that the judge should know that surety was taken, and for a failure to take such surety he was made liable to the ward for any damage that he sustained thereby." The statute has been re-enacted by the Legislature since this construction was placed upon it, and we do not think it ought now to be departed from. When a bond is taken under a forged power of attorney, it is void. Though there is an appearance of a bond, there is in fact no bond taken, with surety, as required by the statute. It being the absolute duty of the county judge to take the bond with surety, he can not be excused from liability, as the jury were told by the instructions above quoted, if he exercised that degree of care and prudence which a reasonably prudent business

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man would have exercised in providing surety for his own debt or property. He must either require the surety to sign the bond in person and in his presence, or he must require the surety to authorize the signing of his name by a written power of attorney, authenticated in the manner allowed by law. County clerks and notaries public are authorized to take the acknowledgments of persons to such instruments, but unless the power of attorney was authenticated by some officer authorized to take acknowledgments to deeds, or its due execution was proven under oath by the subscribing witnesses, or one of them, as provided by law, the paper was not legally authenticated, and the county judge acted upon it at his peril. The statute is a wise one, and must not be frittered away by construction. Infants are unable to protect themselves, and are at the mercy of their guardians where no bond is taken. County judges and their sureties are therefore made responsible to the ward in this contingency.

Judgment in each case reversed, and cause remanded for a new trial.

Petition by appellant for extension of opinion overruled.

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CASE 3—ACTION BY F. S. BURK AGAINST J. C. B. FOSTER FOR DAMAGES FOR UNSKILLFUL SURGICAL TREATMENT.—OCT. 21.

Burk v. Foster.

APPEAL FROM OWEN CIRCUIT COURT.

JUDGMENT FOR DEFENDANT AND PLAINTIFF APPEALS. REVERSED.

PHYSICIANS—SKILL REQUIRED—LIABILITY FOR LACK OF SKILL.

1. The care and skill required of a physician in treating a patient is not to be measured by that exercised by "ordinarily skillful and prudent physicians in that (particular) vicinity in treating a like injury," but by such as is exercised generally by physicians of ordinary care and skill in similar communities.

2. The mere fact that the result of a patient's treatment "is as good as is usually obtained in like cases similarly situated" will not preclude a recovery by the patient against the physician for negligence and lack of skill, the patient being entitled to the chance for the better results which might come from proper treatment.

W. W. DICKERSON AND J. W. CAMMACK FOR APPELLANT.

On January 31, 1900, appellant, while driving a team hitched to a farm wagon, was thrown therefrom with great force, falling on his arm and shoulder, and was dragged some distance by reason of the lines being entangled around his leg. He was assisted to the house of Mrs. Williams and sent for appellee, who is a physician and surgeon, to treat his injuries, and who came within an hour after the injuries were received. The examination by appellee was made in the presence of Mrs. Williams and her two sons, no other persons being present. Appellee says he found the humerus broken in two places and an oblique break between, making three fractures of the bone; one at the surgical neck, and one at the insertion of the deltoid muscle, and one between the two. He denies that it was a simple fracture. He admits that he did not then discover that the shoulder joint was dislocated, and says it was not then dislocated, but admits he found it dislocated on an examination made after the patient had ceased to take treatment.

Appellant says that the doctor did not uncover or examine the shoulder joint at all; did not remove the shirt therefrom, and

114	20
124	772

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did not in fact see the shoulder, and stated to him that it was a "simple lap break," and in this statement appellant is corroborated by Mrs. Williams and her two sons.

Appellant did not know his shoulder was dislocated until after the doctor had discharged him in April, more than two months after he was injured, when Dr. Stamper casually examined him one day in a store and told him, and he then reported the fact to appellee, who then examined him and told him it was not dislocated, but was only sore and would slowly get well.

This suit was brought on August 14, 1900, in which appellant seeks to recover damages for the neglect of the appellee in failing to discover and correct the dislocated shoulder whereby appellant has become permanently crippled.

Our contention is that instruction No. 3, given by the lower court, is unauthorized in any view of the case, and that there is no allegation in the pleadings upon which to predicate it. Said instruction is as follows:

"The court instructs the jury that, although they may believe from all the evidence in this case that the defendant failed to exercise that degree of skill care and attention in setting, dressing and treating plaintiff's arm, which an ordinarily prudent and skillful physician and surgeon in that vicinity would have exercised in treating a like injury, yet if the jury further believe from the evidence that the result is as good as is usually obtained in like cases similarly situated, then the jury can not find for the plaintiff any sum whatever on account of his permanent injury, if there is any." This instruction does not distinguish the dislocation from the fractures, is confusing and misleading and does not clearly and fully state the law of the case.

We submit that the verdict is palpably against the evidence and is contrary to law, that all the instructions are erroneous, and the third so flagrantly wrong as to render a recovery impossible. *Lewis v. Dwinnell*, 84 Me., 497, and cases cited.

LINDSEY & BOTTS FOR APPELLEE.

MOODY & BOURNE OF COUNSEL.

Our contention is that the instructions were proper, and that the verdict and judgment thereunder are not contrary to law or to the evidence. *Alexander v. Menifee*, 23 Ky. Law Reporter, 1151.

OPINION OF THE COURT BY JUDGE O'REAR—REVERSING.

Appellant brought this suit against appellee,, a physi-

cian and surgeon, to recover damages for the alleged careless and negligent treatment of appellant's broken and dislocated arm. The original injury was caused by the overturning of appellant's wagon, the team becoming frightened, running away with the wagon, and dragging appellant over frozen and rough ground for quite a distance, fracturing his arm in one or more places between the elbow and shoulder, and dislocating the arm at the shoulder joint. The bone broken was the humerus. The dislocation was the slipping, pushing, or wrenching the head of the humerus from the glenoid cavity. Within an hour after the accident appellee was called in to attend the injuries. It is charged that he failed to discover the dislocation, and therefore failed to treat it. The consequence was, as alleged, that the muscles of this arm have atrophied, the shoulder joint is stiffened, and this arm is now practically useless. All agree that, when discovered, some months later, it was too late to remedy the matter. It is charged that appellee's failure to discover and treat the dislocation was because of his negligence and lack of proper care and diligence. Appellant and appellee each lived in the vicinity of Monterey, in Owen county. Monterey is a village on the Kentucky river, but not on any railroad line. It is not claimed that the fractures were not properly treated. They have healed, and apparently in good condition. The whole case turns upon the nature of the examination given appellant by appellee, and appellant's duties in that respect. That appellee did not discover the dislocation is admitted, as it is, of course, that he did not treat it. That it could have been discovered by an ordinary examination does not seem to admit of doubt. As to the manner of treatment that should have been given to it, there is some conflict in the evidence.

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The circuit court gave the jury the following instructions as embracing the law of this case: "(1) The court instructs the jury that if they believe from all the evidence in this case that the defendant, in setting, dressing and treating the plaintiff's arm, did not exercise that degree of skill, care and attention which ordinarily skillful and prudent physicians and surgeons in the vicinity would have used in a like injury, then the jury should find for the plaintiff such damages as they believe from the evidence he has sustained, if any, not to exceed \$10,000, the amount claimed in the petition, and in estimating the damage the jury should consider the physical pain suffered by the plaintiff on account of such unskillful and careless services, and the impairment of his ability to earn money on account thereof. (2) The court instructs the jury that if they believe from all the evidence in this case that the defendant, in setting, dressing plaintiff's arm, used and exercised the degree of skill, care and attention that ordinarily skillful and prudent physicians and surgeons in the vicinity would use in setting, dressing and treating a like injury, then the jury should find for the defendant. (3) The court instructs the jury that, although they may believe from all the evidence in this case that the defendant failed to exercise that degree of skill, care and attention in setting, dressing and treating plaintiff's arm which an ordinarily prudent and skillful physician and surgeon in that vicinity would have exercised in treating a like injury, yet if the jury further believes from the evidence that the result is as good as is usually obtained in like cases similarly situated, then the jury can not find for the plaintiff any sum whatever on account of his permanent injury, if there is any." Under these instructions the jury found for the defendant.

For appellee it is claimed that this court approved this set of instructions (though this fact is not to be gathered from the opinion) in *Alexander v. Menefee*, 23 R., 1151, 64 S. W., 855. In that action the patient had recovered a judgment against the physician under the instructions referred to, and the latter had appealed, claiming that these instructions were prejudicial to him, in not being sufficiently liberal. The case was affirmed, this court holding that the instructions were as favorable to the defendant as he was entitled to. This is by no means an approval of the instructions. It leaves the question open so far as they affect the rights of the other party. In *Hickerson v. Neely* (21 R. 1257) 54 S. W., 842, this question was not involved in the decision. As has been stated, Monterey is a village, somewhat isolated, and is a rural community. The number of physicians residing and practicing in that "vicinity" is not shown, but presumably they are not numerous. It will be observed that the court, by the instructions given the jury, restricted the skill, attention and prudence required of the physician in this case to such as was exercised by "ordinarily skillful and prudent physicians and surgeons in that vicinity in treating a like injury." There are some cases which limited the physician's liabilities by this standard. So far as this State is concerned, we are not aware of any reported case where we have approved of this doctrine. It may be that in any given community—a rural one, sparsely inhabited—there may be only one or two physicians, and they may each be utterly incompetent, and be what is popularly termed a "quack." Should the law permit such a one to hold himself out as a member of this learned profession, and invite the confidence and reliance of those suffering from serious injuries and ailments, so as to engage his

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services, and then, though he is a mere bungler and an ignoramus, an empiric of the lowest degree, allow him to escape liability for his negligence and lack of skill upon the plea that he and his associates in the profession in that community are all of a kind, and none of them have either sense, care, or capacity? The mere statement of the proposition would seem to carry with it its answer. In *Gramm v. Boener*, 56 Ind., 497, it was said: "It will not do, as we think, to say that, if a physician or surgeon has exercised such a degree of skill as is ordinarily exercised in the particular locality in which he practices, it will be sufficient. There might be but few practicing in the given locality, all of whom might be quacks, ignorant pretenders to knowledge not possessed by them; and it would not do to say that, because one possessed and exercised as much skill as the other, he would not be chargeable with the want of reasonable skill." See, too, *Kelsey v. Hay*, 84 Ind., 189, and *Smothers v. Hanks*, 34 Iowa, 286, 11 Am. Rep., 141. On the other hand, it must be recognized that the most efficient and talented in the profession generally, and very naturally, seek better and more lucrative fields for employment; that those living in a sparsely settled neighborhood will not have, in any probability, the experience, the opportunity for acquiring skill by practice in such cases, that comes to the practitioner of medicine and surgery in the city. It generally follows, then, that the practitioners in rural localities have not the same high degree of skill, or knowledge, or education that may be found in large cities and populous communities. As the physician engages to bring to bear upon the case only such skill and care as is ordinarily practiced by others of the same profession in like situation, his liability should be measured by that standard. We think the

sounder rule is, not that the physician's skill and degree of attention should be measured by those of his community, but by such as is exercised generally by physicians of ordinary care and skill in similar communities. As said in *Smail v. Howard*, 128 Mass., 131, 35 Am. Rep., 363: "He was bound to possess that skill only which physicians and surgeons of ordinary ability and skill, practicing in similar localities, with opportunities for no larger experience, ordinarily possess."

The third instruction given is also erroneous. In addition to the criticism already discussed, to which it, too, is subject, it precludes a recovery, whatever the defendant's negligence or lack of skill, "if the result is as good as is usually obtained in like cases similarly situated." It is known of all men that many cases of injury or illness are recovered from without any medical attention, while many others of the same kind do not recover, although apparently the best medical attention is given. What the proportions are might be impossible to determine. It is equally well known that two or more cases of apparent similarity, treated by the same treatment, and, indeed, by the same physician, may, and often do, have directly opposite results as to recovery. We think, when a physician undertakes to give his attention, care and skill to a given case of injury or disease, the patient is entitled to the chance for the better results that are supposed to come from such treatment, and as are recorded by the science of his profession to a proper treatment. That the patient might have died in spite of the treatment, or that "ordinarily" they did die in such cases (as formerly in cases of cholera, smallpox, etc.), is no excuse to the physician who neglects to give his patient the benefit of the chance involved in a proper treatment of his case. That no treat-

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ment would avail, or that ordinarily careful treatment would not, might be shown, if the case so warranted. In this case the patient was entitled to an ordinarily careful and thorough examination of his injuries, such as the circumstances attending their infliction, the condition of the patient, and the surgeon's opportunities for proper examination suggested and allowed. If the dislocation was discoverable by such examination, and if the physician felt that because of lack of appliances or lack of experience he was unable to treat any peculiar feature of the injury, it was at least the right of the injured man to be apprised of his condition, that he might call in more skilled attention if he desired.

Whether the verdict is sustained by the evidence need not be discussed in view of the conclusions to which we have arrived on other points of the case.

Judgment reversed, and remanded for a new trial under proceedings not inconsistent herewith.

Petition for rehearing by appellant overruled.

CASE 4.—ACTION BY T. G. BAILEY AND OTHERS AGAINST L. G. WOOD AND OTHERS, SETTLEMENT OF ACCOUNTS, &c.—OCT. 22.

Bailey and Others v. Wood and Others.

APPEAL FROM LOGAN CIRCUIT COURT.

JUDGMENT FOR DEFENDANTS AND PLAINTIFFS APPEAL. REVERSED.

SETTLEMENT OF ACCOUNTS—MISTAKE—EVIDENCE—INTEREST—BILLS OF EXCHANGE DISCOUNT—TOBACCO WAREHOUSEMEN—FEES—BOND—STATUTES.

Held: 1. Where one seeks to surcharge a settlement of account for mistake of facts not known to him when the settlement was made, it is incumbent on him to sustain the charge clearly by a preponderance of evidence.

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2. In an action to foreclose a mortgage, wherein defendant contended that the mortgage note was by mistake given for a greater sum than due, evidence considered, and **HELD** not to sustain such defense.
3. Defendant, in order to secure funds to purchase tobacco, was in the habit of drawing a draft on a factor, who paid the draft. Defendant then drew a bill of exchange with the factor as drawee and a certain national bank as payee. The factor then accepted and delivered the bill to the bank, which credited the factor with the net proceeds, deducting ten or eleven per cent. interest, the bill drawing six per cent, after maturity; and when due the factor paid it, charging the whole expense to defendant. **HELD**, that defendant drew as an accommodation indorser to the factor, and the latter was the principal, and hence interest paid to the bank by the factor was not chargeable to defendant, but he was liable for the legal interest on the original draft until he paid the debt.
4. Code Tenn., section 3381 (1880a) 2597, requires a tobacco warehouseman to give a bond to keep his warehouse in good condition. **HELD**, that when a warehouseman gives a bond, and then moves his business to another warehouse, it is not necessary for him to give a new bond.
5. Under Code Tenn., sections 3388, 3389, relative to inspectors of tobacco, and making warehousemen inspectors of tobacco, with authority to appoint deputies, it is not necessary that the deputies should be warehousemen.
6. Several warehousemen have the right to appoint the same deputy.
7. Code Tenn., section 3399 (1898a) 2615, provides the compensation of warehousekeepers for receiving, storing, inspecting, cooperating, and selling tobacco shall be as follows, to-wit: To be paid by the seller, \$2.50, and one per cent. commission on proceeds of sale; to be paid by buyer, \$1.50, and for storage after sale, after the first thirty days, for each month or part thereof, twenty-five cents; and section 3400 (1899a) 2616 imposes a penalty for charging any more than is allowed in the preceding section. **HELD**, that the fees specified in section 3399 cover only the items enumerated, and on a resale of tobacco after a rejection of bids by the owner under authority of section 3400 the warehouseman on a resale may charge a fee of two dollars for his expenses for resampling and reselling, according to a custom prevailing for twenty years.

W. P. SANDIDGE, FOR APPELLANTS.

BROWDER & BROWDER, FOR APPELLEES.

(No briefs.)

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OPINION OF THE COURT BY JUDGE O'REAR—REVERSING.

Appellees are tobacco warehousemen at Clarksville, Tenn. Appellant, T. G. Bailey, is a farmer, and was a buyer and shipper of leaf tobacco at the time of the transactions out of which this suit has grown. Prior to September 16, 1897, the dealings between the parties had been such that it was claimed by appellees, and then admitted by appellant, that he was indebted to them in a sum in excess of \$4,329.04. On that date appellant executed to appellees a note for the said sum, secured by mortgage on certain real estate in Logan county, this State. The parties continued to have, or to complete, after the date of the note, some transactions as to the sale of certain tobacco consigned to appellees. This suit was brought July, 1900, to enforce the mortgage lien in satisfaction of the note above mentioned. Defense was made. From the rather voluminous pleadings we gather that issue was tendered and joined as to the following matters, involving pleas of payment, usury, set-offs and counterclaims: (1) It was claimed that the indebtedness of appellant to appellees at the time the note was executed was not as much as the face of the note, the discrepancy occurring by reason of the fact that appellees had failed to account to appellant for all the tobacco shipped to and sold by them, and had failed to account for the true amount it sold for; that appellant, not knowing then the true state of accounts, but relying on appellees' representations concerning them, executed the note sued on for too great an amount, through mistake of fact and of law. (2) That the note embraced a large amount of usury charged appellant by appellees for the loan or forbearance of money furnished to him by them. (3) That appellees claimed to be and were operating a tobacco warehouse at Clarksville, Tenn.,

but had failed to comply with certain provisions of the Code of Tennessee containing the statute law of that State, and by reason of such failure had forfeited their right, or rather had never legally acquired the right, to charge for and receive the fees allowed by statute for storing and selling tobacco; that these fees were collected of appellant notwithstanding—at least are embraced in the note sued on; that as to these also appellant was laboring under a mistake of law and fact when the note was executed. (4) That by the statutes of Tennessee warehousemen are allowed \$2.50 per hogshead and 1 per cent. on the gross sales, to be charged to the shipper, as the whole of their compensation for services rendered the shipper in “receiving, storing, inspecting, coopering, and selling” his tobacco; that appellees in many instances (about 160) charged \$2 additional to the fees enumerated; that the Tennessee statutes provided a penalty of \$10 for each of said offenses, recoverable by action by the shipper. Appellant claimed \$1,600 on this score as a set-off to the note. Other items of minor importance were presented also. Whether allowed or disallowed, neither party to this appeal seeks to disturb the chancellor’s finding as to them. Consequently they will not be noticed further.

The transactions between these parties began in 1894, and continued until 1898. During this period the volume of these dealings was something over \$43,000. When the note sued on was executed, it was the evident purpose of the parties to close their dealings by that transaction, at least to the extent of the amount of the note, in the nature of a settlement. The plea attacking the transaction on the ground that appellant did not then owe appellees that sum is in the nature of an attempt to surcharge a settlement for mistake of fact, not known by the com-

plainant when the settlement was made. It is, of course, incumbent upon the party making the charge to sustain it, not merely by an appearance of probabilities, but clearly by the preponderance of the evidence. Appellant shows himself, by his letters filed in the record, and by the manner of conducting his business, to be deficient in education, and rather loose in the matter of keeping his accounts. This does not necessarily impeach his general intelligence, but the fact will serve to explain, we think, wherein he might easily have been deceived either by appellees, if they had undertaken it, or by his own lack of accurate information as to his own affairs. In his showing in the evidence under this first head he testifies merely that he shipped in the aggregate 384 hogsheads of tobacco to appellees, which they sold on his account. The dates of sales, the weights (in most instances), the prices and the amount of net proceeds he says nothing about. He relies entirely upon appellees' showing to supply the needed evidence on this point. This showing is made—it may be said, exclusively—in the testimony of the witness Ely, appellees' bookkeeper, introduced by them. The manner of producing this evidence for appellant must be noticed. Appellees had filed with an amended pleading a "statement" in which they purported to give the exact state of the account between these parties. This statement credited, by date, etc., the net proceeds of the sale of each hogsheads of tobacco. During the examination of the witness Ely by appellees' attorney, he testified that this statement had just been compared with the firm's books (then present, it seems), and was correct in every item, save he had not verified the extensions of interest, and there was an error of \$1.06 in the footings against appellant. The statement and books of appellee were then present where

the depositions were being taken, it appears. On cross-examination this witness was asked to file, and in compliance did file, a statement from the books showing original (or private) numbers of appellant's tobacco, the dates sold, price per 100 pounds at which it was sold, and the weights. No further question along these lines was asked of this witness or any witness. From the original "statement" first adverted to the claim and theory of appellees as to the state of this account is sustained. But by a comparison between that first statement and the one elicited from the witness Ely by the question mentioned it is shown that in nearly every instance (there were but few, if any, exceptions) the sum by which appellant was credited on the first "statement" as the proceeds of the sale of his tobacco was less, and sometimes much less, than the last statement showed that the same tobacco brought, by multiplying the net weight by the price per 100 pounds. This makes a considerable difference, apparently in appellant's favor; and upon this state of facts is built an ingenious argument, maintained with the rare ability displayed by able counsel throughout the case, that appellees had failed to account to appellant for the true amount or the whole of the money for which his tobacco sold. It must be remembered that the first statement professed to give the net proceeds only of sales. The result of the last statement was necessarily to learn only the gross proceeds of the sales. Between these two results was a difference as obvious in reason as in fact. That the warehousemen charged for and deducted their statutory commissions for making the sales, and in many instances the \$2 fee for reselling, hereinafter more fully discussed, is admitted. That they also paid the freights and drayage is also clearly shown, and is not disputed. What these

freight and drayage charges amounted to the record does not show. No witness was asked concerning them. But, after deducting the charges for fees alluded to, there remained generally, and indeed, in about every instance, a sum that would not be presumably disproportionate to what must have been the freight and drayage charges paid by appellees for appellant on each package or group reported sold. Another item—insurance—was admittedly paid by appellees. That amount was not shown, nor was it attempted to be. Appellees' books, as has been stated, were present. The course of the examination of the witness showed that they were before counsel, and were submitted to his inspection. Whether they showed or failed to show the items just referred to, the record is silent. But the discrepancy between the statements, made up from the same books and entries, one showing net and the other gross proceeds of sales, indicates pretty conclusively that these books will show something as charges which reduced the gross sales by the amount of this difference. It was, then, for appellant to show either that these discrepancies were not so accounted for, or that they were not properly accounted for. The volume of these transactions, their nature and the period of time over which they extended, were such that it would have been impracticable, if not well-nigh impossible, at this late date to have shown them otherwise than by the original entries made concurrently with the transactions. That the usual statements of each sale, showing itemized bills, were furnished appellant, is shown. The failure to object to them then, or in a reasonable time, coupled with the entries of the charges just referred to, and especially with the partial settlement made when the note was exe-

cuted, made out for appellees a *prima facie* case that such charges and sales had occurred as therein stated, and thereafter the burden was upon appellant to invalidate them. In this he failed. The circuit court so ruled.

2. It is claimed by appellant that appellees agreed, as an inducement to him to bring his business to their warehouse, that they would furnish him what money he needed to enable him to make his purchases in the country, provided he would ship the tobacco to them. They looked to their factor's lien to reimburse them the money thus advanced. As to what was actually agreed on this score is not made as clear as could be desired. But from all the evidence, from the character of the dealings between the parties, and from what appellees actually did, we conclude that appellant is sustained in this contention. Appellees say that they did not have extensive capital, but did have a large credit with the banks of their town. The bank with which they are shown to have transacted the business so far as this venture is concerned, was the First National Bank of Clarksville, Tenn. This bank had a capital of \$100,000. Appellees had already borrowed from it for use otherwise in their business \$10,000, or 10 per cent. of its capital, the maximum sum which it could loan to one person or firm under the national banking act. Appellant does not appear to have been known to this bank, nor to have had any credit there. So, when appellant needed money in making his purchases in the country, he would draw a sight draft on appellees for the sum required. This draft he generally procured his own banker at Adairville, Ky., to cash for him. The Adairville bank would forward the draft, through regular channels, to Clarksville, where it would be paid by appellees. Thereupon appellees would draw up a four-months bill of ex-

change for the sum just paid, plus the bank rate of discount, or interest for that time at 10 per cent., or 11 per cent. per annum, and send to appellant to be signed and returned to them. In this bill appellant appeared as drawer, appellees as drawee, and the First National Bank of Clarksville as payee. When so signed and returned to them, appellees would accept the bill by their written indorsement across its face, and deliver it to the First National Bank of Clarksville, who would thereupon credit to appellees the net proceeds—that is, the original sum for which appellant had drawn—the bank reserving to itself the interest or discount referred to. When this bill became due, appellees paid it, and charged its gross sum as of that date to appellant. In this way appellant was made to pay the interest, whether at 10 per cent. or 11 per cent., for the use of this money from the date he received the money till the bill became due, and 6 per cent. per annum thereafter on this sum until he repaid it to appellees. There were a great number of these transactions. Appellant seeks a credit for the whole of the interest thus paid by appellees, or at least for the excess of interest paid over the legal rate (it being admitted that 6 per cent. per annum was the legal rate of interest in Tennessee at that time). Appellant stakes his claim to this relief on two grounds: (a) That the real transaction was between appellees and appellant; that it was appellees who procured the money, and furnished it to appellant, and whether they kept the interest charged or gave it to the bank for supplying them with the money is immaterial as affecting the character of the transaction between these litigants. And (b) although the transaction may be that appellant borrowed the money from the bank—that is, discounted the paper to the bank—appellees were thereon merely his accommodation

indorsers, and therefore his sureties; and the taking of a discount at a higher rate than 6 per cent. per annum was usury, and under Revised Statutes U. S., sections 5197, 5198, forfeited all the interest in that bill, and that thereafter no party to the paper was obligated in law to pay any part of the interest; and therefore, when appellees, as such indorsers (or accommodation acceptors), did pay it, it was a voluntary act, and imposed on him no legal liability to repay them the interest so paid. The last of these propositions only—being the most favorable—is argued by counsel for appellant in his brief. The first is gathered from the pleadings. We find ourselves unable to agree with the last proposition. The error of its conclusion rests upon what we believe is a misconception of the relation of these parties. It is assumed in the argument that the acceptor of a bill of exchange is the surety of the drawer to the payee. Just the converse of this is true. "The effect of the acceptance of a bill is to constitute the acceptor the principal debtor. The bill becomes, by the acceptance, very similar to a promissory note; the acceptor being the promisor, and the drawer standing in the relation of the endorser." Daniel, Neg. Inst., section 532, and cases cited. The same author (section 1303), treating of who are principals and who sureties, and general principles of sureties' liabilities, says: "In the first place, as to who are to be regarded as principals and who as sureties: The acceptor of a bill and the maker of a note, when the acceptance is made or note executed upon a valuable consideration, are undoubtedly principals as to all the parties thereto." The same author recognizes what must be the law in this respect, and that is that, as between drawer and acceptor, their obligations and rights growing out of the bill will depend upon the nature of their contract with respect to

it; as, for example, if the acceptor is an accommodation acceptor, upon the payment of the bill he will have a cause of action against the drawer for money had and received. On the other hand, if the acceptor has funds in his hands against which the drawer has a right to draw the bill, its acceptance and payment would amount simply to a discharge of the acceptor's original obligation to the extent of the amount of the bill. But if the bill was drawn for the benefit and accommodation of the acceptor, and he received the proceeds and benefit thereof, then the drawer is the accommodation party, and the obligation, as between the drawer and acceptor, is that of the acceptor. *Edelen v. White*, 6 Bush, 408. Applying this doctrine to the case at bar, we find that, as between these parties litigant, their agreement was that the warehousemen, the acceptors of the bill, were to furnish money by way of loan or advancement to the drawer of the bill with which to buy tobacco to be shipped to the acceptors, and by them sold on account of the drawer, and the proceeds applied to the discharge of the acceptor's debt thus created. Therefore, upon the making of the first draft, that is, the original sight draft, which was paid by appellees upon presentation, the relation of debtor and creditor was created, the acceptor's claim against the drawer being for money had and received. The making of a new bill at four months by the original drawer upon the warehousemen as acceptors and in favor of the warehousemen's bank, the First National Bank of Clarksville, was a new arrangement by which the drawer of the bill drew it as an accommodation to the acceptors' and the bill was used by the acceptors with which to raise money for their own account. Therefore, not only as between the bank and the acceptors, but as between the drawer and acceptors, the acceptors were the principals in this last ob-

ligation. All the interest that they paid to the bank, whether usury or not, was their own liability. From this it follows that it was error to charge any part of this interest to appellant, and that, in so far as the note sued on embraced such items, it is without consideration. But appellant is liable to appellees to the extent of the money furnished to him upon the original sight drafts, with 6 per cent. per annum interest thereon from the date it was so furnished until paid.

3. To entitle one to the benefits and privileges accorded by the statutes of Tennessee to tobacco warehouses, he is compelled to make showing that he is equipped with a suitable warehouse, appliances, etc., and to enter into bond of \$5,000 to the State that he will keep his warehouse in proper condition, etc., and to take an oath prescribed by the statute. The sections of the Tennessee Code covering these matters, including privileges and penalties, are as follows:

“3379 (1877a) 2594. Warehouses. Any citizen may open a warehouse for the inspection and sale of tobacco under the rules, regulations and restrictions of this article.”

“3380 (1879a) 2596. Proof of Sufficiency of Warehouse Required. Every person so doing shall prove to the clerk, by the testimony of two impartial witnesses known to him to be well qualified, from knowledge and experience, as judges in the matter, that he is proprietor of a good and sufficient warehouse, so situated as to be exposed to no extraordinary risk from fire or flood, and furnished besides, with all the implements necessary to the accurate weighing and inspection of tobacco.

“3381 (1880a) 2597. Bond of Tobacco Warehouseman. He shall also enter into bond, with good and sufficient security to be approved by the judge or chairman of the county court,

and payable to the State, in the sum of five thousand dollars, conditioned to keep his warehouse in good condition and repair, so as to effectually protect the tobacco stored therein; that he will not sell any tobacco that has been bought by him, or on his account, or purchased on his account any tobacco stored in his warehouse, either directly or indirectly, and that he will perform faithfully all the duties of warehouse keeper as prescribed by law.

"3382 (1881a) 2598. Failing to Give Bond, not to Collect Fees; Penalty. Should said proprietor fail to execute said bond for five thousand dollars, then he shall not be entitled to collect any fees on tobacco stored in his warehouse, under a penalty of one hundred dollars for each offense, to be recovered in the name of the State, one half to go to the informer.

"3383 (1882a) 2599. Who may Sue, Bond. Any planter or person aggrieved may sue on this bond for a breach thereof in the name of the State, until the penalty is exhausted."

Sections 3388, 3389, then provide the duties of inspectors and their deputies:

"3399 (1898a) 2615. Fees, Commissions, etc. The compensation of warehouse keepers for receiving, storing, inspecting, cooping and selling tobacco shall be as follows: to-wit: To be paid by the seller, \$2.50 and one per cent. commission on proceeds of sale; to be paid by buyer, \$1.50, and for storage after sale, after the first thirty days, for each month or part thereof, twenty-five cents.

"3400 (1899a) 2616. Penalty for Extortion. Any warehouse keeper who shall charge more than is allowed in the preceding section, is guilty of a misdemeanor, and is also liable to a penalty of \$10 to the planter or person over charged, recoverable before any justice of the peace.

"3401 (1900a) 2617. Refusing Bid. Any planter or other owner of tobacco sold at auction, may, by paying the fees, refuse at the time to take the price at which it was cried off."

It is claimed that appellees failed to comply with these sections in any particulars, and especially in these: They originally opened a warehouse in a certain part of the town, calling their house the "Grange." Later they removed to another warehouse, calling it the "Gracy." They did not execute a new bond, or take the oath anew, when they made this removal (although they seem to have complied originally). Appellant insists that the purpose of the bond, etc., is directed to the "house," while appellee's version is that it is to the business only. We are of the latter view. It is also provided that warehousemen, by taking the oath and executing the bond referred to, became thereby inspectors of tobacco, and are charged with certain duties as such. No provision is made for any other inspector than one who is a warehouseman, except that warehousemen who are inspectors may appoint deputies. There appears nothing in the chapter, as quoted to us, requiring such deputies to be warehousemen. The warehousemen of Clarksville, and the wholesale buyers patronizing that market, organized a corporation under the laws of Tennessee as early as 1878, known as the "Clarksville Tobacco Board of Trade." Only buyers and sellers of tobacco in that market are eligible as members. One of the rules or by-laws adopted by the board is: "That this board decides that an independent board of inspectors shall be elected, who shall be deputized by the board of warehousemen as inspectors, to act in their place," Then follows a formula by which such inspectors are to be chosen, and regulating their compensation. We are of opinion that each of the warehouse-

men had the right to designate as their deputies the same persons. Nor is there any impropriety shown, and at least no illegality, in their allowing such deputies to be nominated or agreed upon by the method of submitting the matter to a committee of warehousemen and buyers. We are clearly of opinion that appellees were entitled to receive and collect the statutory fees for receiving, storing and selling appellant's tobacco.

Appellant claims that under section 3399 the fee therein provided to the warehousemen is in full of all the services that he may render to the shipper; that the charge of \$2 for reselling, called "resampling," is an extortion, under section 3400. In the absence of a construction by the courts of Tennessee of this section, this court is inclined to hold, and in this case does hold, that the fee of \$2.50 and 1 per cent. commission allowed the warehousemen against the shipper is meant to cover only those items specifically referred to in that section. It was shown in this case that the shipper, within a given number of days after an auction sale of his tobacco, has the right to reject a bid, under section 3401; that appellant did reject bids to the extent of about 160 in number, thus necessitating a resale of that tobacco. It was shown that the actual expense to the warehousemen was about \$2 in each case of resale. It has been the custom in that market for about 20 years to charge this fee for resampling or reselling. It does not appear that any prosecutions or suits for extortion have been brought by the parties to these innumerable transactions in the courts of Tennessee, all parties apparently acquiescing in this rule of the board of trade. Such a contemporaneous construction by the parties directly affected by the act for such a great length of time is strongly

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persuasive that the charge under question is not prohibited by the statutes, and therefore not an extortion.

The judgment is reversed, and cause remanded, with directions to ascertain the amount of interest included in the note sued on, growing out of the discounting by appellees with the First National Bank of Clarksville of appellant's time bills of exchange, and to deduct the same from appellant's debt, but to charge appellant in lieu thereof the 6 per cent. per annum interest upon the moneys furnished him by appellees on the sight drafts as of the date of their payment by appellees, and for other necessary proceedings not inconsistent herewith.

114	42
115	281

114	42
117	622

114	42
128	387
128	388

114	42
134	415
135	788

CASE 5—ACTION BY THE LOUISVILLE BRIDGE COMPANY AGAINST GUS G. COULTER, AUDITOR, FOR AN INJUNCTION.—OCTOBER 22.

Coulter, Auditor v. Louisville Bridge Co.

APPEAL FROM FRANKLIN CIRCUIT COURT.

JUDGMENT FOR PLAINTIFF AND DEFENDANT APPEALS. AFFIRMED.

TAXATION—FINALITY OF ACTION OF ASSESSING OFFICERS.

Held: Where the proper assessing officers, in the time and substantially in the manner prescribed, have acted in fixing the valuation on property liable to assessment for taxation and no relief has been sought, in the time allowed for correction of their action, it is final.

CLIFTON J. PRATT, ATTORNEY GENERAL, FOR APPELLANT.

The appellant filed a general demurrer to the plaintiff's petition, which was overruled by the lower court, and failing to plead further the court granted a permanent injunction according to the prayer of the petition from which judgment this appeal is prosecuted.

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The question presented is whether, the former Board of Valuation and Assessment, by declaring there was "no franchise," can estop the present board from fixing the value of the appellee's franchise?

The Constitution, section 174, provides "that all property, whether owned by natural persons or by corporations, shall be taxed in proportion to its value unless exempted by the Constitution."

The capital stock of a corporation includes the entire property, real and personal, including assets on hand, to be valued as an entirety from which deduct the tangible property already assessed and the net balance shows the franchise value which is subject to taxation. *Henderson Bridge Co. v. Com.*, 99 Ky., 641; *Henderson Bridge Co. v. Negley*, 23 R., 756. The undisputed facts in this case show that the value of appellee's franchise was \$662,998 for the year in question.

The duty of the board is to *fix the value* of the franchise. It has no power to *exempt* the franchise from taxation. To say that there is "no franchise," as the appellee contends was done, was in effect to release its property from taxation.

It has been held in *Stone, Auditor v. City of Louisville*, 22 Rep., 423, that "The board of valuation and assessment has power to make retrospective assessments for franchise taxes."

No injustice was done the appellee by fixing its franchise, as the admitted facts show that it had such a franchise subject to the tax imposed by law.

CHARLES H. GIBSON & W. S. PRYOR, FOR APPELLEE.

There were two hearings before Auditor Stone and his board on the question of whether there was any franchise to be taxed, resulting in "*no franchise*," as alleged in the petition.

The present auditor concluded the valuation of the bridge was too low, and undertook to make a re-valuation and fixed an estimate on the value different from that of the former board.

There is no evidence or statement that any mistake was made, misrepresentation or fraud practiced by any one in the former assessment.

We contend that there must be some finality to such important matters, and if a reduction or increase of values is to prevail as each board coming into power may estimate former values, there will be no end to the litigation that will necessarily arise, and no permanence in any finding by such boards, but all will be left open for correction by subsequent boards, without any evidence of fraud, mistake or concealment of values charged.

OPIN'ON OF THE COURT BY JUDGE O'REAR—AFFIRMING.

The Louisville Bridge Company filed with the auditor of public accounts in September, 1898, its report as of September 15, 1898, then required of it by law to enable the value of its franchise to be ascertained and assessed for taxation by the board of valuation and assessment for the year 1898. The report was duly received by the auditor, and was by him submitted to the board of valuation and assessment, and considered and acted upon by the board, who valued appellee's franchise at the sum of \$529,998. The auditor directly notified appellee, in writing, of such valuation, advising it that under the law it had thirty days within which to be heard on the subject. Within the thirty days appellee presented to the auditor and the board a written protest and appeal, in which it set forth facts and reasons why the valuation fixed by the board was erroneous and should be reduced. The substance of this representation was that the board had valued appellee's capital at \$1,787,000, which was \$287,000 in excess of its par value. It was represented, and by the report above referred to was shown, that appellee did not earn for the current year as much as 6 per cent. of its capital stock of a million and a half by some \$10,354.94. It was furthermore shown that of its capital stock there was \$240,000 of it invested in the State of Indiana. This, it was claimed, should either be first deducted from the value of the capital, or added to the value of its tangible property in Kentucky, and then deducted from the value of its capital. It was furthermore shown that, even if it were assumed that its capital was correctly valued, yet its tangible property in Kentucky was assessed as follows:

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Real estate assessed by the county assessor....	\$ 180,915
Bridge property assessed by the county assessor.	1,387,740
Railroad track assessed by railroad commis- sioners	98,900
Total	<hr/> \$1,667,555

To this sum it was claimed that there should be added, as the board had uniformly done before, the assessed value of the company's tangible property in Indiana, which would bring the total to \$1,907,555. It was thus shown that the company for that year was paying taxes on its tangible property at a valuation in excess of its capital, even when valued at the figure originally fixed by the board. Upon this showing the then board of valuation and assessment, who are and then were by law charged with the duty of assessing franchises of such corporations for taxation, determined and decided that under the rule which had been adopted and was then in force, and by which this and all similar corporations were assessed for the taxation of their franchises, there was no value to this franchise to be assessed. It therefore entered upon the records that were kept in the auditor's office in such cases the words "No franchise," thereby meaning to find and finding that the valuation which upon consideration the board had placed upon the property was such that, for the purpose of taxation under the statute in question, it was nil. In the year 1900 the present board of valuation and assessment took up and reconsidered appellee's report first herein referred to, and thereupon revalued appellee's franchise thereunder at the sum of \$662,993, disregarding the action of its predecessor, and making such a record of its action as constitutes evidence of such valuation and assessment by it. It notified appellee of its action, and demanded of it the payment within 30 days of taxes on said assessment, amounting to

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\$3,480.74, and a penalty of 20 per cent., amounting to \$696.15; making in all \$4,176.89. Thereupon appellee filed this suit in the Franklin circuit court, and, upon notice of preliminary hearing, obtained a temporary injunction, issued out of that court against the auditor, restraining him from taking further steps towards collecting this tax or penalty. Upon final hearing upon the facts above shown, the petition being taken as true without answer, the temporary injunction was perpetuated, and the auditor has appealed.

The position taken on this question by appellant and the board of valuation and assessment is that although their predecessor considered and passed on the question of the valuation of appellee's property, in order to assess its franchise for taxation, the present board can review their action, and, if the former act does not correspond with their views, they can reassess the property, or, as there appears no assessment (that is, no certificate of value), they may regard it as properly omitted from assessment. It must be borne in mind that this is not a case of omitted listing or assessment, nor is there a suggestion even of a mistake on the part of the officers. The question resolves itself into this: Is there a time where the action of the assessing officer becomes final both as to the citizen and the taxing power? The question is not here involved as to the effect of the assessor's act if he had erroneously decided that appellee's property in question was not liable to taxation, nor is the question of the power of an assessor to exempt the property of one taxpayer from its proper share of the public burden involved; for in this case no such purpose is stated or intimated. On the contrary, it was shown that the assessing board actually acted upon the identical evidence required by the statute, exercised their judgment as to fixing the value of the property, and found the fact to

be that when there was applied to appellee the same standard by which the valuation of the franchises of all other corporations in this State was arrived at, and the one approved by this court in the case of *Henderson Bridge Co. v. Com.*, 99 Ky., 623 (17 R., 389) (166 U. S., 150) 31 S. W., 486, 29 L. R. A., 73, appellee's franchise had no taxable value. That this conclusion was honestly arrived at, and was correct, is not denied. If the board of 1898 had fixed a valuation of \$100,000 on appellee's franchise, acting under the same circumstances as shown in this case, and appellee had paid the tax, could appellant and his associates constituting the present board have ignored that action, and revalued and reassessed the franchise? If they could, then there is no end to this thing. Nor would there be to any assessment or listing of any property for taxation by any assessing board or assessor.

We are of opinion and hold that when the proper assessing officers, within the time and substantially in the manner prescribed by statute, have acted in considering and fixing the valuation upon property liable to assessment for taxation, and no relief has been obtained within the time allowed by statute for correcting their action, if erroneous, that action is final. The judgment and action of the assessor based upon the legal evidence then obtainable and at hand, and as fixed by statute, when recorded in the proper tax lists, in the very nature of things, should be conclusive upon the State, as well as against the taxpayer. Such being the judgment below, it is affirmed.

Jefferson County v. Waters.

CASE 6—ACTION BY L. B. WATERS, COUNTY TREASURER, AGAINST JEFFERSON COUNTY TO RECOVER SALARY.—OCTOBER 22.

Jefferson County v. Waters.

APPEAL FROM JEFFERSON CIRCUIT COURT, LAW AND EQUITY DIVISION.

JUDGMENT FOR PLAINTIFF AND DEFENDANT APPEALS. REVERSED.

COUNTY OFFICERS—TREASURER—SALARY—INCREASE DURING TERM—VALIDITY—CLERK HIRE.

- Held: 1. Kentucky Statutes, section 934, provides that county treasurers shall receive for their services as compensation a salary not to exceed \$1,000 per annum, to be fixed by the fiscal court; and Const., section 161, declares that the compensation of any county officer shall not be changed after his election or appointment, or during his term of office. HELD, that where a county treasurer's salary was fixed at \$1,000 per annum at the time of his election, the fact that at that time it was not understood that he would be required to perform services that he was subsequently required to perform, but which he was in fact liable to perform at the time of his election, did not authorize the fiscal court to grant such treasurer an additional allowance of \$1,000 for such services.
2. Such increase was not sustainable on the ground that it was voted for clerk hire, made necessary by the increased duties.

SAMUEL B. KIRBY, COUNTY ATTORNEY, FOR APPELLANT.

1. In the absence of express statutory authority, a fiscal court can not allow a county treasurer expenses for clerical assistance. Am. & Eng. Ency. of Law, vol. 7, p. 926; Morgantown Dep. Bank v. Johnson, 22 R., 210; Con. of Ky., 162; People v. Albany Supervisors, 28 Howard Prac.; People v. Supervisors Fulton Co., 14 Barb. R., 56; Robinson v. County of Sacramento, 16 Cal.

2. No one can become a creditor of a county without a contract or agreement made before the services are rendered. Am. & Eng. Ency. of Law, vol. 7, p. 947; Epperson v. Shelby County, 7 Lea (Tenn.) 275.

O'NEAL & O'NEAL, ATTORNEYS FOR APPELLEE.

After the election of appellee as county treasurer and the

114	48
120	464
114	48
d128	114
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execution of his bond and the fixing of his salary at \$1,000 per year, it became necessary under the construction of this court for him to receive and handle all of the county moneys, including that derived from the taxation of all property within the corporate limits of the city, and it therefore became necessary for him to receive and distribute hundreds of thousands of dollars. In order to do this, and to protect the county money, he was compelled to execute a new bond at a large expense and to employ an assistant in his office to help him do the actual necessary clerical work.

Now, the contention in this case is, not that the salary could be increased, for we concede that this can not be done during his term; but this record concedes that the allowance made by the fiscal court is to cover actual expense absolutely necessary to the preservation of the county funds, and this additional expense has been paid out of appellee's own pocket.

He received only \$1,000 salary allowed by law, the remainder being intended by the fiscal court to provide the necessary expense to protect the county fund.

The question, therefore, arises, whether in a case like this, it is within the power of the fiscal court to provide for expenses that are absolutely necessary to properly preserve the county funds?

It is conceded that the treasurer, with all this added revenue on his hands, can not render the actual physical work necessary to attend to the county's business, however efficient he may be; but that, in order to do the work of the county it is necessary to have an assistant in his office.

AUTHORITIES CITED.

Joyes v. Fiscal Court, 21 R., 199; Briscoe v. Clark, 95 Ill., 309; Throop on Pub. Officers, p. 529, p. 571, sec. 495; Powell v. Newberg, 19 Johns. (N. Y.), 284; U. S. v. Stowe, 19 Fed. Rep. (U. S.) 807; Lawrence v. McAlvin, 109 Mass., 311; Barnett v. Patterson, 48 N. J. L., 395; Am. & Eng. Ency. of Law, vol 19, p. 540; 18 Johns. (N. Y.) 242; 77 Ia., 345; 29 Pa. St., 38; 112 U. S., 88; 15 Howe P. R. (N. Y.) 225; 2 Story, U. S., 202; 19 Fed. R., 807; 29 Pa. St., 417; 2 Ct. of Cl., 217; Glenn Case, 4 Ct. of Cl., 501; Sneffin v. N. Y., 4 Sandf. N. Y., 163; Washington Co. Ct. v. Thompson, 13 Bush, 239; Rodman, &c. v. Justices of Larue Co., 3 Bush, 144.

OPINION OF THE COURT BY JUDGE WHITE—REVERSING.

This is the second appeal in this case. The former opinion—
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ion was rendered June 14, 1901. 111 Ky., 286, 23 R., 669, 63 S. W., 613. The former opinion does not disclose the facts, and did not discuss the merits of this case. The appellee, Waters, is the county treasurer of Jefferson county. Before his election the salary of that office was fixed at \$1,000; the county, of course, furnishing his office, and fuel, lights, and janitor service. Appellee presented a petition to the fiscal court, and asked for and obtained an additional allowance of \$1,000 as expenses of the office, to be paid annually. This order was made in February, 1900. From this allowance the county appealed to the circuit court. In that court an amended petition was filed, which set out substantially these facts, viz.: That when appellee was elected county treasurer, and when the salary was fixed by the fiscal court at \$1,000, it was thought that under the law the county levy did not extend over property in the city of Louisville, but only reached property outside of Louisville; and that since appellee's election, and since the salary was fixed at \$1,000, it had been legally determined that the county levy extended over all the property in the county, including property in the city; and that this decision added to the amount of money coming into his hands by about \$140,000—that is to say, before the levy was held to cover the city of Louisville the gross amount received and disbursed by the county treasurer was about \$60,000, and since the adjudication that the levy covered the city of Louisville the gross amount received and disbursed was about \$200,000; that the duty of accounting for this additional sum was not intended to be covered by the salary of \$1,000 fixed. These facts were confessed by the county on demurrer to the petition, which the circuit court overruled, and upon failure to plead judgment was rendered approving and confirming the allowance made by the fiscal

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court, and directing the appellant county to pay that sum, \$1,000, in addition to the fixed salary.

Section 161 of the Constitution provides: "The compensation of any city, county, town or municipal officer shall not be changed after his election or appointment or during his term of office." We have held that this provision prevented payment to the circuit court clerks of a fee for services in felony cases, because that would increase his compensation. *Com. v. Carter*, 21 R., 1509, 55 S. W., 701. We have also held that the county could not pay the county court clerk for copying the census reports of school children. *Bank v. Johnson*, 108 Ky., 507, 22 R., 210, 56 S. W., 825. The reason in the two cases *supra* is the same—that it would be an increase in the compensation of the officer after his election. But here it is said that when the salary was fixed the whole service that appellee, as treasurer, was required to perform was not considered, because it was not in fact known. This may be true, yet all must concede that such was in fact the duty of the county treasurer. He was obliged to receive and account for all moneys due and payable to the county. To add an additional sum of \$1,000 per annum would be to change his compensation. But it is further argued that this additional sum is for clerk hire, necessary to properly attend to the duties of his office. When appellee was elected he undertook to perform the duties of the office of county treasurer, to give his whole time to that office, and the salary was fixed at \$1,000. We know of no authority, in the face of this constitutional provision, that will authorize the fiscal court to make appellee an allowance to pay for services he undertook to perform. If the fiscal court can make the allowance for clerk hire as necessary expenses of the office, the constitutional provision, as well as the statutory limitation (section 934), would amount

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to nothing; the salary of the county judge could be increased, so could that of the county attorney, without limit. It may be, and probably is, true that the salary of \$1,000 is too small, but, in view of the constitutional provision, it must remain the compensation of appellee during his present term of office.

If the present allowance can be made notwithstanding the Constitution and the statute (section 934), the compensation could be changed whenever the levy was changed, or the amount received by the treasurer varied from that of the year in which the salary was fixed. That would be every year. If the amount of money that came to appellee had been intended to be the basis of compensation, the fiscal court should have made his salary a per centum, instead of the fixed sum; but the maximum would be \$1,000 by the statute. In our opinion, there was no authority in the county fiscal court to make the allowance.

Judgment reversed, and cause remanded, with directions to sustain the demurrer to the petition, and for proceedings consistent herewith.

CASE 7—APPLICATION BY THE CAMPBELLVILLE TELEPHONE COMPANY
AGAINST CHARLES PATTESON, CIRCUIT JUDGE, FOR A WRIT OF PROHIBITION—GRANTED.—OCTOBER 23.

Campbellsville Tel. Co. v. Patteson Circuit
Judge.

PROHIBITION—SCOPE OF WRIT—POWER TO ISSUE—ISSUANCE AGAINST
CORPORATION.

Held: Under Const., section 110, providing that the court of appeals shall have power to issue such writs as may be necessary to give it a general control of inferior jurisdictions such

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court has authority to grant a writ of prohibition against a circuit judge proceeding without jurisdiction.

2. Kentucky Statutes, section 3639, provides that the validity or constitutionality of any city ordinance of fifth class cities shall be tried by a writ of prohibition from the judge of the circuit court in which such city is located, with right of appeal by either party to the court of appeals; and Civ. Code, section 479, declares that the writ of prohibition is an order of the circuit court to an inferior court of limited jurisdiction, prohibiting it from proceeding in a matter out of its jurisdiction. *Held*, that a writ of prohibition could only issue to test the validity of an alleged invalid ordinance in a case where a judge was attempting to enforce the same, and could not be granted against a private corporation to prohibit it from acting under the ordinance.

HELM, BRUCE & HELM, ATTORNEYS FOR PLAINTIFF.

Without notice and without a hearing and without requiring the plaintiff to give any bond of any kind, Judge Patteson, in the suit of Thomas E. Green against The Campbellsville Telephone Company, has entered an order prohibiting said company from exercising its franchise in the town of Campbellsville or from erecting any line in front of plaintiff's particular property, until the Taylor circuit court shall act upon plaintiff's motion for a writ of prohibition in that suit, which motion is set for January 15, 1903, a period of four months from the entry of Judge Patteson's order.

We claim that this procedure is without legal warrant, and is utterly void, and the telephone company asks a writ of prohibition against Judge Patteson to prevent him from enforcing this most remarkable order.

That this court has authority to grant the writ now sought, is settled in this State. *L. & N. R. R. Co. v. Miller*, 23 R., 1714 and cases there cited.

The suit in which this order was entered was a suit in which Thomas E. Green (who is the clerk of the Taylor circuit court) asks for a writ of prohibition against said telephone company, and the city of Campbellsville.

Our contention is, that the court has absolutely no authority to grant a writ of prohibition in a suit by a citizen against a private corporation and a municipality, there being no proceeding pending in any court of inferior jurisdiction which the circuit court was seeking to prohibit from exceeding its jurisdiction.

"The writ of prohibition is an order of this circuit court

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to an inferior court of limited jurisdiction prohibiting it from proceeding in a matter out of its jurisdiction." Civ. Code, sec. 479, which is to some extent modified by the present Constitution which provides that *this court* "shall have power to issue such writs as may be necessary to give it a general control of inferior jurisdictions."

If this order might, by any kind of construction be treated as a preliminary *injunction* or restraining order, it will not help it, for the provision of the Civil Code is mandatory that neither a preliminary injunction nor a restraining order can be issued *except upon the execution of a bond*. And in this case no bond was executed or required.

The code also expressly provides that a temporary injunction can only be issued on *notice* and in this case no notice was given, and no time or place fixed at which the applicant may move to grant the injunction.

We therefore ask that the writ of prohibition prayed for by the plaintiff, herein be granted, and that Judge Patteson be prohibited from enforcing the order made by him in the suit for prohibition.

AUTHORITIES CITED.

Civil Code, sec. 479; Patten v. Stephens, 14 Bush, 324, 329; L. & N. R. R. Co. v. Miller, 23 R., 1714.

CHARLES PATTESON, FOR DEFENDANT.

I granted the temporary writ of prohibition complained of herein as provided in section 476 of the civil code, which is as follows: "During the pendency of the motion, the court or judge in vacation may make temporary orders for preventing damage or injury to the applicant until the motion is decided." I have been unable to find any authority under the code or any law requiring the execution of a bond by the plaintiff in such a proceeding; nor do I find any law requiring the plaintiff in such a case to give notice of his application for a temporary order of restraint as provided under the section of the code above quoted.

The suit of Green against The Campbellsville Telephone Company, *et al.*, as the court will observe from the petition, is, to test the validity or constitutionality of a city ordinance of a city of the fifth class. Section 3639, Kentucky Statutes, provides how such suits shall be brought as follows: "The validity or constitutionality of any city ordinance, by law or rules of the fifth class cities shall be tried by a writ of prohibition from the judge of the circuit court in which said city

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is located with right of appeal by either party to the court of appeals."

By this statute there is *enjoined* upon the circuit judge the plain and mandatory duty of hearing and determining such questions, and for the purpose of ascertaining the validity of such an ordinance to issue the writ of prohibition.

The defendant most earnestly urges and submits, that in making the temporary restraining order complained of by plaintiff, he was acting as a judicial officer of this Commonwealth and the question for this court to decide, as defendant contends, is not whether he was acting erroneously in entering said temporary restraining order, but whether he acted within his jurisdiction, and if he had jurisdiction of the parties and of the subject matter of the action, then the plaintiff's remedy is not by a writ of prohibition, but is by appeal to a court of appellate jurisdiction.

The petition which the basis of the rule asked for in this action does not allege that the defendant, as judge of the eleventh judicial district, was acting out of his jurisdiction at the time he made the temporary order of restraint complained of.

For the reasons given, we think the demurrer of the defendant to the petition should be sustained and the writ of prohibition denied.

AUTHORITIES CITED.

Sasseen v. Hammond, 18 Ben. Monroe, 672; Preston v. Fidelity Trust Co., 94 Ky., 265; Bank Lick Turnpike Co. v. Phelps County Judge, 81 Ky., 613; Shinkle v. City of Covington, 83 Ky., 420; Gibbs v. Board of Aldermen, 95 Ky., 471; Goldsmith v. Owen, 95 Ky., 490; Civil Code, secs. 474, 475, and 476; Kentucky Statutes, sec 3639; Am. & Eng. Ency of Law, vol. 19, p. 270; *Ex parte* Rountree, 51 Ala., 42.

ADDITIONAL BRIEF BY DEFENDANT.

In this case it will be contended very forcibly that the circuit judge in the case of Green v. The Campbellsville Telephone Company, &c., in the Taylor circuit court, had no jurisdiction, or, if this be not so, then the circuit judge exceeded his legitimate power in doing what he did do. Under our statute a circuit judge has jurisdiction of all matters of the common law and all matters of the statute laws except what is specifically denied to him in express terms, and in every application for a writ of prohibition under our laws which is materially different from prohibition under the common law,

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the only important question for inquiry is, as to whether the inferior tribunal is guilty of usurpation and abuse of power beyond its jurisdiction of the subject matter.

Under our statute an ordinance of the city of Campbellsville is to be tested by prohibition which we shall contend, authorizes when a petition is filed or a motion for prohibition is asked, that it then becomes the province of the court to make a temporary restraining order until a certain time which may be at any time in the discretion of the court up to and including some day in the next ensuing regular term of the court. In this case notice has been given and executed upon the defendant that the plaintiff would, on the 10th day of the January term, 1903, make such motion before the Taylor circuit court, that being the next regular term of said court, and said motion is now pending. And when a matter is to be tried by prohibition and comes up like the matter did come up in the case of *Greene v. The Telephone Company and the City of Campbellsville*, it is our contention that the circuit judge in doing what he did do, that is, make a temporary restraining order, only up to the day the motion for a writ of prohibition was set for trial, did not exceed his jurisdiction and was not acting in excess of his power, when he granted the temporary writ complained of by the plaintiffs herein, but was simply acting in pursuance of section 476 of the Civil Code.

OPINION OF THE COURT BY JUDGE HOBSON—GRANTING WRIT.

On September 17, 1902, T. E. Green filed in the Taylor circuit court his petition against the Campbellsville Telephone Company and the city of Campbellsville, in which he alleged that he was a resident of Campbellsville, the owner of real and personal property therein, and a taxpayer; that the Campbellsville Telephone Company, a corporation created under the laws of this State, having its principal office at Campbellsville, had constructed its wires and poles and was operating an exchange in said city, claiming the exclusive franchise to operate and maintain same in the city for the period of 15 years from the 23d day of April, 1900, under authority of ordinances enacted by the city council of Campbellsville; that these ordinances were in conflict with section 164 of the Constitution of

the State, and in violation of section 3636, Kentucky Statutes, and were void. He prayed an order prohibiting the telephone company from digging holes, erecting poles or stringing wires thereon, in front of his residence, or in or over the streets or alleys of the city, and that the ordinance be declared null and void. On the filing of the petition the circuit judge made a temporary order of prohibition, as prayed in the petition, during the pendency of the motion, and until the order of the court in the action. The telephone company thereupon, on the 24th of September, filed in this court its petition against the circuit judge, setting out the above facts, and praying a writ of prohibition against him, prohibiting him from enforcing the order he had entered, and commanding him to treat the same as null and void, on the ground that he was proceeding in the matter without jurisdiction.

Under section 110 of the Constitution, this court has power to issue such writs as may be necessary to give it a general control of inferior jurisdictions. Under this provision it has been held in a number of cases that this court has power to grant a writ of prohibition where a circuit judge is proceeding without jurisdiction. See *Railroad Co. v. Miller* (23 R., 1714) 66 S. W., 5, and cases cited. Of course, no inquiry can be made in such a proceeding as to the regularity of the action of the circuit judge, if he had jurisdiction. However erroneous it may have been, his action can only be reviewed by appeal, if he had jurisdiction to act at all. No question, therefore, arises as to the sufficiency of the petition that was presented to him. The only question is did he have power to grant a writ of prohibition in the premises? The order can not be treated as an injunction, for the reason that it appears from the record that an injunction had been granted, which was dis-

solved by a judge of this court, and under the Code an injunction can not be obtained where one injunction has already been dissolved. The order must therefore be treated as an order of prohibition, and was unwarranted if the circuit judge was without authority to grant a writ of prohibition in such a case. Section 3639, Kentucky Statutes, is relied on as conferring such jurisdiction: "The validity or constitutionality of any city ordinance, by-law or rules of the fifth class cities shall be tried by a writ of prohibition from the judge of the circuit court in which said city is located with right of appeal by either party to the court of appeals." In *Patton v. Stephens*, 77 Ky., 324, a similar provision of the charter of the city of Covington was before this court. That provision was in these words: "The validity of the ordinance shall be tried by writ of prohibition from the circuit court, which may be granted by any circuit judge out of term, or by the court having jurisdiction over said city; and each party shall have the right to appeal or prosecute a writ of error to the court of appeals." Acts 1849-50, p. 261. Similar provisions were made in the charters of many other cities and towns, and when, upon the adoption of the new Constitution, general laws were passed for the government of these municipalities, the same provision was made for testing the validity of the ordinance. The provision of the Kentucky Statutes is, in substance, the same as that of the charter of the city of Covington above quoted. Construing this provision, the court said: "The remedy here provided can only be invoked by one against whom a proceeding under an ordinance is pending in an inferior court. The writ of prohibition is directed to a judicial tribunal, and not to a legislative body, such as the city council." This construction of the statute has been acquiesced in by the Legislature, and

can not be departed from after so many years; for it must be presumed that, when the Legislature brought over into the general laws for the government of the cities the provision which had thus been construed, it did so in view of the interpretation which the language had received, and the settled practice under those statutes. This construction harmonizes the statute with the Code of Practice and the well-settled common-law rule. By section 479 of the Civil Code, "the writ of prohibition is an order of the circuit court to an inferior court of limited jurisdiction prohibiting it from proceeding in a matter out of its jurisdiction." At common law the writ only lay to restrain judicial tribunals from unauthorized judicial acts. It could not be used to prevent the performance of ministerial acts, nor could it be sued to restrain executive officers or private persons or corporations. 16 Ency. Pl. & Prac., 1102, 1108. The reason for the distinction is that the writ of injunction affords an adequate remedy in actions against private persons or corporations or ministerial officers. The purpose of the statute seems to have been not to change the character of a writ of prohibition which was so well settled, but to authorize the issuance of the writ where persons were proceeded against under ordinances which were claimed to be invalid, thus securing them an adequate remedy; for there might be no appeal, and the cost of defending a multitude of suits made it necessary to have some more summary way of testing the validity of the ordinance at the outset. In this case the defendants who were proceeded against by the writ of prohibition were the telephone company, a private corporation, and the city of Campbellsville. No remedy was sought against any judicial officer, and, under the rule of construction announced in the case re-

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ferred to, the circuit judge was not authorized by the statute to issue the writ of prohibition in the contest.

The motion is therefore sustained, and the writ of prohibition from this court may issue as prayed in the petition.

 CASE 8—ACTION TO RECOVER DAMAGES FOR THE DEATH OF PLAINTIFF'S
 INTESTATE.—OCTOBER 23.

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APPEAL FROM MASON CIRCUIT COURT.

JUDGMENT FOR DEFENDANT AND PLAINTIFF APPEALS. AFFIRMED.

 MUNICIPAL CORPORATIONS—NEGLIGENCE—OBSTRUCTION OF STREET—
 STREET RAILROAD—INJURIES TO PEDESTRIANS—PROXIMATE CAUSE.

Held: 1. Plaintiff alleged that defendant, city, permitted one of its streets to become obstructed on its north side by debris, etc., leaving only a narrow path between the obstruction and the tracks of a street railway, and permitted undergrowth, bushes, etc., to remain in the street, which obstructed the vision of pedestrians on that side, and that by reason thereof plaintiff's intestate, while walking along such path, was struck by a car and killed. Plaintiff further alleged that the collision occurred in the day time, and that the motorman in charge of the car by the exercise of ordinary care could have discovered intestate's peril in time to avoid striking her. HELD, that the negligence of the city in permitting the street to be obstructed was not the proximate cause of the accident.

A. E. COLE & SON, ATTORNEYS FOR APPELLANT.

Appellant's intestate, in July 1900, while on her way from a grocery store on Second street in the city of Maysville, intending to go to a coal yard on the same side of Second street and thence home, was confronted near the place of her injury by a trolley pole, piles of brick, stone, wood and other debris, undergrowth, weeds and bushes on one side, while on the other side was the road bed and track of the Maysville street railway company. In order to avoid walking on the railway track, which was of higher grade than the rest of the street,

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she was forced to enter upon a narrow path on said street used by the public which extended about one hundred feet beyond said obstructions. While thus lawfully on said pathway, and in the exercise of ordinary care, she was, without fault on her part, struck by the projecting step of the street car and killed. These facts are all set out in plaintiff's petition and amended petitions to which a demurrer was sustained by the court and the petition dismissed, from which this appeal is prosecuted.

The question then, is, whether the petition and amendments thereto, state facts sufficient to constitute a cause of action against the city of Maysville.

It is admitted under the allegations of the petition that Second street, where deceased was killed, was one of the streets of the city in public use, and that, because of the piles of lumber, brick and other debris, together with the undergrowth and bushes, deceased was *forced* into the narrow path used by the traveling public at that point, and that the roadbed of the street railway was in such close proximity to said obstructions as to leave only a narrow path to pedestrians walking on the north side of the street; that said street was not of an equal grade at the place of the injury, and for that reason pedestrians were *compelled* to use the pathway.

1. We contend that the city was bound to see that the highway was safe and convenient for travel thereon in the light of such conditions as are likely to occur.

2. That the city has the power and it is its duty to see that there shall be no structure or physical thing in, upon, near or over the traveled part of the highway which obstructs or hinders one in the use thereof.

3. That where two causes combine to produce an injury to a traveler upon a highway both of which are in their nature proximate, the one being a culpable defect in the highway, and the other some occurrence for which neither party is responsible, the municipality is liable, provided the injury would not have been sustained but for such defects.

4. It is immaterial what is the intermediate cause between the act complained of and the injurious consequence, if such act is the efficient and proximate cause, and the consequence was the probable result.

5. In determining what is a proximate cause, the true rule is, that the injury must be the natural and probable consequence of the negligence, such as the natural surrounding circumstances of the case might and ought to have been foreseen by the wrongdoers as likely to follow from his act.

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The test is, was the new and independent force, acting in and of itself in causing the injury and superseding the original wrong complained of, so as to make it remote in the claim of causation, although it may have remotely contributed to the injury as an occasion or condition thereof?

7. The question as to whether a given act of negligence was the proximate cause of the injury complained of, where the character of the facts is such that different conclusions may be drawn from them, is a question for the jury.

8. Wherever the authorities throw a highway open for traveling or invite and induce travel thereon by any other means, the duty to keep it open arises, and they will be liable in a proper case for failing to perform that duty.

9. The averment that appellee's negligence was the proximate cause of the injury, was not a legal conclusion, but the averment of a fact which is admitted by the demurrer.

10. In view of the facts admitted by appellee to be true, we maintain that there is nothing in the pleadings from which it can reasonably be inferred that decedent was guilty of contributory negligence.

11. The maxim "*causa proxima, non remota, spectatur*," we submit, does not mean that the cause or condition which is nearest in time or space to the result, is necessarily to be deemed the proximate cause.

AUTHORITIES CITED.

1. *Hampson v. Taylor*, 15 R. I., 83; *City Louisville v. Snow*, 54 S. W., 860; *City of Huntington v. McClurg*, 22 Ind. App., 261; *Schafer v. Mayor N. Y.*, 1154 N. Y., 466; *Barbour v. Rocksbury*, 11 Allen, 318; *Lindsay v. Danville*, 45 Vt., 72.

2. *Day v. Melford*, 5 Allen, 98; *Post v. Poston*, 141 Mass., 189; *Hewison v. New Haven*, 34 Conn., 142; *Drake v. Lowell*, 13 Met., 292; *Talbot v. Taunton*, 140 Mass., 552; *Jones v. New Haven*, 34 Conn., 10; *West v. Lynn*, 110 Mass., 514.

3. *Elliott on Streets and Roads*, sec. 617; *Joliet v. Verley*, 35 Ill., 58; *Bloomington v. Bay*, 42 Ill., 503; *Lacon v. Page*, 48 Ill., 500; *Cartersville v. Cook*, 129 Ill., 152; *Bellville v. Hoffman*, 74 Ill. App., 503; *Crawfordsville v. Smith*, 79 Ind., 388; *Towler v. Linguist*, 138 Ind., 566; *Langhammer v. Manchester*, 99 Ia., 295; *Atchison v. King*, 9 Kn., 550; *Basset v. St. Joseph*, 53 Mo., 290; *Hull v. Kansas City*, 54 Mo., 598; *Brennan v. St. Louis*, 92 Mo., 482; *Vogelsang v. St. Louis*, 139 Mo., 127; *Vogel v. Westplains*, 73 Mo. App., 588; *Lundeen v. Livingstone Electric Light Co.*, 17 Mont., 432; *Norris v. Lichfield*, 35 N. H., 271; *Clark v. Barrington*, 41 N.

H., 44; *Winship v. Enfield*, 42 N. H., 197; *Ayers v. Hammondsport*, 130 N. Y., 665; *King v. Cohoes*, 77 N. Y., 83; *Roblee v. Indian Lake*, 11 N. Y. App. Div., 435; *Dillon v. Raleigh*, 124 N. Car., 184; *Hunt v. Pawnal*, 9 Vt., 411; *Kilsey v. Glover*, 15 Vt., 708; *Allen v. Hancock*, 16 Vt., 230; *Fletcher v. Barnett*, 43 Vt., 192; *Sherwood v. Hamilton*, 37 U. C. Q. B., 410.

4. 1 *Sutherland on Damages*, secs. 37, 38, 40; *Terre Haute, &c., I. C. R. R. Co. v. Buck*, 36 Ind., 346; *Louisville N. & C. Ry. Co. v. Wood*, 113 Ind., 544; *Mexican Nat. R. R. Co. v. Mussette*, 86 Tex., 708; *Durrey v. Fletner*, 118 Mass., 131, 251; *Baxter v. R. I. P. R. Co.*, 87 Ia., 488; *Chicago & N. W. R. R. Co. v. Prescott*, 59 Fed. Rep., 237; *Gibson v. Del. & H. Canal Co.*, 65 Vt., 283; *Bigelow on Torts*, 277; *Henry v. Dennis*, 93 Ind., 452; *Aetna Ins. Co. v. Boone*, 95 U. S., 117; *State v. Manchester & L. R. R. Co.*, 52 N. H., 532; *Topsham v. Lisbon*, 65 Me., 449; *Taylor v. Baldwin*, 78 Cal., 517; *E. Tenn. V. & G. R. R. Co. v. Lockhart*, 79 Ala., 315; *Gerhart v. Bates*, 2 El. & Bl., 490; *Hodley v. Northern Trans. Co.*, 115 Mass., 304; *Durrey v. Fuller*, 118 Mass., 131; *Pa. R. R. Co. v. Hope*, 80 Pa., 373; *Seale v. Gulf C. & S. F. R. R. Co.*, 65 Tex., 274.

5 and 6. *W. Mahamy Twp. v. Watson*, 112 Pa., 574; 16 Am. & Eng. Ency. of Law, 445; *Harriman v. Pittsburg C. & St. L. R. R. Co.*, 456 Strat., 11; *Pa. Co. v. Congden*, 134 Ind., 226; *Aetna Ins. Co. v. Boone*, 95 U. S., 117; *Gordon v. Rimmington*, 1 Campb., 123; *Lowry v. Manhattan R. R. Co.*, 99 N. Y., 158.

7. *Welch v. Lander*, 75 Ill., 95; *Hill v. Windsor*, 118 Mass., 251; *Savage v. Chicago, M. & St. P. R. R. Co.*, 31 Minn., 419; *Johnson v. Same*, 31 Minn., 57; *Lake v. Milligan*, 62 Me., 240; *Shoredan v. Brooklyn City & N. R. R. Co.*, 36 N. Y., 39; *Dunn v. Cass Av., etc.*, R. R. Co., 21 Mo. App., 188.

8. *Terise v. St Paul*, 36 Minn., 521; *Aurora v. Coalshire*, 521 Ind., 584; *Murphy v. City Indianapolis*, 83 Ind., 576; *Baldwin v. City Springfield*, 141 Mo., 576; *City of Ord v. Nash*, 50 Neb., 335; *Phillips v. City Huntington*, 35 W. Va., 406; *Sewall v. City Cohoes*, 45 N. Y., 725; *Miller v. City of Newport*, 93 Ky., 22; *Gallagher v. St. Paul*, 28 Fed. Rep., 305; *Saulsbury v. Ithaca*, 94 N. Y., 27; *Regna v. Rochester*, 45 N. Y., 129; *Schafer v. Mayor N. Y.*, 154 N. Y., 466; *Taacke v. Seattle*, 16 Wash., 90; *City Mt. Carmel v. Blackburn*, 53 Ill. App., 658; *Foxworthy v. City Hastings*, 25 Neb., 133; *Mansfield v. Moore*, 21 Ill. App., 326; *Barton v. Montpelier*, 30 Vt., 650; *Steubenville v. King*, 23. O. St. Rep., 610; *City Louisville v. Snow*, 54 S. W., 860; *Henderson v. Sandifer*, 11 Bush, 550; *Davenport v. Ruckman*, 37 N. Y., 573; *Fugate v. City of Som-*

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erset, 97 Ky., 48; Elliott on Streets and Roads, secs. 618, 626, 634, 824.

9. Wabash County v. Purson, 120 Ind., 426; Louisville, &c., R. R. Co. v. Thompson, 107 Ind., 442; Same v. Wood, 113 Ind., 544; Am. & Eng. Ency. Law, vol. 14 p. 336.

10. Louisville, &c., R. R. Co. v. Blaydes, 51 S. W., 820.

11. Atchison, &c., R. R. Co. v. Stanford, 12 Kan., 354, 377; Wright v. Chicago, &c., R. R. Co., 27 Ill. App., 200; Cheeves v. Danielly, 80 Ga., 114; Thompson on Negligence, last edition, vol. 1, sec. 54 and authorities cited therein; Lane v. Atlantic Works, 11 Mass., 136, 139; Baltimore City R. R. Co. v. Kemp., 61 Ma., 619.

L. W. GALBRAITH, FOR APPELLEE.

CLASSIFICATION OF QUESTIONS DISCUSSED.

1. Statement. The question as to whether there should be a sidewalk on the north side of Second street, was legislative in its nature, and the city incurred no liability, in refusing to open that part of the street as it would in neglecting the discharge of a ministerial duty. Dillon's Municipal Corporations, vol. 2, sec. 949; Elliott on Streets and Roads, secs. 447 and 478; City of Henderson v. Sandefur & Co., 11 Bush, 550.

2. No action lies against a city for negligence in the exercise or non-exercise of its discretionary powers, of a public or legislative character. Foregoing authorities and also, Wheeler v. City of Poplar Bluff, Mo., Municipal Corporations cases annotated, vol. 3, p. 20; Rivers v. the City Council of Augusta, 65 Ga., 376, 38 Am. Rep., 787; Anderson v. East, 117 Ind., 126, 70 Am., St. Rep., 35; Detroit v. Beckman, 34 Mich., 125; Grant v. Erie, 69 Penn. St. Rep., 420.

3. The city is the sole judge as to what portion of the street is necessary for public use. Elliott on Streets and Roads, sec. 491.

4. The authorities cited by appellant relate to ministerial duties and do not apply to this case. Fugate v. the City of Somerset, 97 Ky., 48; City of Newport v. Miller, 93 Ky., 22; City of Louisville v. Snow's Admr., 54 S. W., 860.

5. The city committed no breach of duty in suffering the Maysville street railway and transfer company to operate its road as alleged by appellant.

6. Appellant's petition states too much, and shows that the accident resulted from the negligence of the Maysville street Railway and Transfer Company, and the contributory negligence of his intestate. Elliott on Streets and Roads, sec. 761; Johnson's Admr. v. L. & N. R. R. Co., 91 Ky., 653.

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7. No act or negligence of appellee was the proximate cause of the death of appellant's intestate. *Wood v. Penn. R. R. Co.*, 35 L. Rep., Ann., 199; *Shields v. The L. & N. R. R. Co.*, 97 Ky., 103.

THOMAS M. WOOD AND E. L. WORTHINGTON, FOR APPELLEE.

AUTHORITIES.

When the motorman operating an electric street car negligently runs it over a person walking on the track and kills him, a defective condition of the contiguous sidewalk which induced the person to leave it and walk on the street car track, is not the proximate cause of his being run over and killed. And, therefore, an action can not be maintained against the city for causing his death by neglecting to repair the sidewalk. *Scheffer v. Washington R. R. Co.*, 105 U. S., 249; *Shields v. L. & N. R. R. Co.*, 97 Ky., 110; *Whitaker's Smith on Negligence*, pp. 36 and 37; *Butz v. Cavanaugh*, 59 Am. St. Rep., 504; *Wood v. Penn. R. R. Co.*, 55 Am. St. Rep., 728; *McGahan v. Indianapolis Natural Gas Co.*, 49 Am. St. Rep., 199; *Cooley on Torts*, p. 70; *Southside Passenger Ry. Co. v. Frick*, 2 Am. St. Rep., 672.

PROXIMATE CAUSE.

Shearm. v. Redf., vol. 1, sec. 25, and note, p. 25; *Blks. L. & P. Acc. Cases*, sec. 21, p. 22 and note; *Wharton's Law of Negligence*, sec. 134; *Rowell v. City of Lowell*, 7 Gray, 100; *Kidder v. Inhabitants of Dunstable*, 7 Gray, 104; *Shepherd v. Inhabitants of Chelsea*, 4 Allen, 113; *Jones v. City of Williamsburg*, Mun. Cor. Cases, vol. 3, p. 444; *Eisenbrey v. Pennsylvania Co. for Ins.*, 141 Pa. St., 566; *West Mahoney Township v. Watson*, (116 Pa. St., 344) Am. St. Rep., vol. 2, p. 604; *Pa. R. R. Co. v. Kerr*, 62 Pa., 353, 1 Am. Rep., 431; *Scott v. Hunter*, 46 Pa. St., 192, 84 Am. Dec., 542; *Hey v. Philadelphia*, 81 Pa. St., 44; *Pittsburg v. Grier*, 22 Pa. St., 54, 60 Am. Dec., 65; *West Mahoney Township v. Watson*, 112 Pa. St., 574; *South Side Passenger Railway Co. v. Trich*, (117 Pa. St., 390), Am. St. Rep., vol. 3, p. 672; *Hoag v. Lake Shore, &c.*, R. R. Co., 85 Pa. St., 293, 27 Am. Rep., 653; *Pa. R. R. Co. v. Hope*, 80 Pa. St., 373, 21 Am. Rep., 100; *Hoag v. Michigan Southern, &c.*, R. R. Co., 85 Pa. St., 293, 27 Am. Rep., 653; *Myer v. Lindell Ry. Co.*, 6 Mo. App., 27 (1887).

The governmental function and discretionary powers of the board of council. Subsec. 25, sec. 3490, Kentucky Statutes, *Danville H. & W. R. R. Co. v. Com.*, 73 Pa. St., 38; *Randle v.*

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Pacific R. R. Co., 65 Mo., 325, 333; Dillon's Mun. Corp., vol. 2, sec. 949, p. 1157; Sherm. & Redf., vol. 1, sec. 270, p. 466, and note 3; Elliott on Roads and Streets, sec. 761, p. 819; Malloy v. Wabash, &c., R. R. Co., 84 Mo., 270; Blks. L. & P. Acc. as., sec. 56; Beem v. Tama & T. Electric Railway & Light Co.

THOMAS R. PHISTER, REPLY BRIEF FOR APPELLANT.

POINTS AND AUTHORITIES.

1. Negligence of city as to obstruction of streets. *City of Henderson v. Sandefur & Co.*, 11 Bush, 550; *Bassett v. City of St. Joseph*, 53 Mo., 290; *Danville Board of Council v. Boyd County*, 21 Ky. Law Rep., 196.

2. Contributory Negligence. *Favre v. L. & N. R. R. Co.*, 91 Ky., 541; *Ramsey v. L. C. & L. R. R. Co.*, 89 Ky., 103; *P. & M. R. R. Co. v. Hoebl*, 12 Bush, 41

3. Proximate Cause. *Chiles v. Drake*, 2 Metcalf, 149; *Encyclopaedia Pleading & Practice*, vol. 14, p. 336; *L. & N. R. R. Co. v. Wolfe*, 80 Ky., 84; *Schultz v. Moon*, 33 Mo. App., 329; *Wharton on Negligence*, secs. 144-145; *Lane v. Atlantic Works*, 111 Mass., 140; *Milwaukee & St. Paul Ry. Co. v. Kellogg*, 94 U. S. (Otto, 469), *Aetna Ins. Co. v. Boon*, 95 U. S., (5 Otto, 117), *Cooley on Torts*, sec. 70; *Pittsburg v. Grier*, 22 Penn. State, 54 (60 Am. Decisions, 65) *Wharton on Negligence*, sec. 997; *Erie v. Schwingle*, 22 Penn. State, 384 (60 Am. Dec., 87); *Scott v. Hunter*, 46 Penn. State, 192 (84 Am. Dec., 542); *Louisville Gas Co. v. Gutenkuntz*, 82 Ky., 432; *Whitaker's Smith on Negligence*, pp. 36-37; *Stanley v. Union Depot R. R.*, 114 Mo., 606 (21 S. W. Rep., 832).

OPINION OF THE COURT BY JUDGE BURNAM—AFFIRMING.

Elizabeth Setter was run over and killed by an electric street car whilst walking along the north side of Second street, in the city of Maysville, just outside the track of the railway company, and her administrator in this suit seeks to recover damages for her death against the city of Maysville on the ground that the negligence of the city authorities was the proximate cause of her death. The alleged acts of negligence charged against the city are, in substance, that Second street is one of the main thoroughfares of the city; that the city authorities negligently left

large piles of brick, tin cans, railroad ties, and other debris in the street between the track of the railway company and the north side of the street, and that they also permitted undergrowth, bushes, etc., to grow on the north side of the street, near the place of the accident, which obstructed the vision of pedestrians traveling on the north side thereof, and forced them to travel in a narrow beaten path between said undergrowth and debris, on the one side, and the track of the Maysville Street Railway & Transfer Company, on the other, for a distance of about 300 feet; and that the city authorities permitted the railway company to maintain trolley poles along its track, and the grade to be one or two feet higher than the portion of the street on the north side, and failed to erect barricades between the street and the trolley track. After setting out the various acts of negligence relied on against the city, the petition charges "that on the — day of —, 1900, while his intestate was passing along the north side of said street, going east from a store where she had been on business, in a direct line to Dryden's coal office and yard, on the north side of said street, one of her objective points, she arrived at said pole, or thereabouts, and being confronted by said undergrowth, weeds, piles of stone, railroad ties, and other debris, and said street at a lower grade than that of the railroad bed on the one side, and being confronted by the railroad track on the other, she was forced to avoid the danger of crossing or walking on said track to travel the said narrow, beaten pathway on said side, used by the public generally, between said pole and said track, and whilst between said pole and said track she was, without fault on her part, struck by a car of the Maysville Street Railway & Transfer Company; that, by reason of the gross acts of negligence aforesaid, she was knocked under the wheels of

said car, and so bruised and mangled that she died from such injuries."

It is not alleged that Second street was ever graded or sidewalk constructed for the use of the public on the north side of said street at and along the place where the accident occurred. Substantially the only wrong charged to appellee which contributed in any wise to the death of intestate was its failure to keep the north side of Second street free from the obstructions enumerated, which compelled plaintiff's intestate to walk so close to the street car track that she was run over and killed thereby. The circuit judge sustained a general demurrer to the original and various amended petitions, and the plaintiff has appealed; and the question to be determined is, conceding the alleged facts to be true, was the negligence complained of the proximate cause of the injury and death of plaintiff's intestate? There can be no doubt that the actual and immediate cause of her death was the collision with the trolley car. But it is insisted for appellant that, as appellee was primarily negligent in the discharge of the duties imposed upon it by law, its negligence, as well as that of the railway company, which actually inflicted the injury, must in law be considered as the proximate cause of intestate's injury. Thompson, in his Commentaries on the Law of Negligence (section 44), says: "No negligence or other wrong of any kind whatsoever can furnish the foundation of an action for damages unless it was the proximate cause of the injury suffered by the plaintiff; the maxim of law being '*Causa proxima, non remota, spectatur.*'" Section 5. This being one of the elements essential to recovery, it follows that the burden of showing that the negligence or other wrong was the proximate cause of the injury is upon the plaintiff. The plaintiff must not

only prove negligence, but he must also prove that the negligence was the proximate cause of the injury." And he cites by way of illustration the case where a railway company violates an ordinance limiting the speed of its trains within the limits of a city, or runs an engine in the night-time without a headlight, and during the period of this dereliction injury happened to various persons, which they failed to show was due to the dereliction, but to some other causes, for which the defendant was not responsible. In all these cases it was held that the plaintiff could not recover. On the other hand, it is said that, where the proximate cause and sole cause of the injury is specifically ascertained, the law will not stop to speculate on what might have occurred had such cause been absent. In 2 Shear. & R. Neg., section 26, the author says: "The breach of duty upon which an action is brought must not only be the cause, but the proximate cause, of the damage to the plaintiff. We adhere to this old form of words because, while it may not have originally meant what is now intended, it is not immovably identified with any other meaning, and is the form which has been so long in use that its rejection would make nearly all the reported cases on the question involved unintelligible. The proximate cause of an event must be understood to be that which in the natural and continuous sequence, unbroken by any new cause, produces that event, and without which that event would not have occurred." In note 3, the authors say: "If it can not be said that the result would have inevitably occurred by reason of the defendant's negligence, it can not be found that it did so occur, and the plaintiff has not made out his case." And Wharton, in his Law of Negligence (section 134), says: "Suppose that, if it had not been for the intervention of a responsible third party, the defendant's neg-

ligence would have produced no damage to the plaintiff; is the defendant liable to the plaintiff? This question must be answered in the negative, for the general reason that causal connection between negligence and damage is broken by the interposition of independent human action. I am negligent on a particular subject-matter as to which I may not be contractually bound. Another person, moving independently, comes in, and, either negligently or maliciously, so acts as to make my negligence injurious to a third person. If so, the person so intervening acts as a nonconductor, and insulates my negligence so that I can not be sued for the mischief which the person so intervening directly produces. He is the one who is liable to the person injured. I may be liable to him for my negligence in getting him into difficulty, but I am not liable to others for the negligence which he alone was the cause of making operative." And in section 999: "It has already been seen that the negligence of a third person intervening between the defendant's negligence and the damage breaks the causal connection between the two. . . . There is no road that has no imperfections, and, if a traveler is forced against one of these through the negligence of a third party, it is from the latter, and not from the town, that redress must be sought." In *Scheffer v. Railroad Co.*, 105 U. S., 249, 26 L. Ed., 1070, this state of case was presented: By reason of the collision of two railway trains, a passenger was injured, and in consequence became insane, and some eight months thereafter committed suicide. It was held in a suit by his personal representatives against the railway company that his own act was the proximate cause of his death, and they were not entitled to recover from the company. The court in that case, through Judge Miller, said: "In order to warrant a finding that negligence, or an act

not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and it ought to have been foreseen in the light of attending circumstances." In Whitt. Smith, Neg., p. 137, it is said: "If the negligence of the defendant would not have caused the injury but for the intervention of the negligence of a third person, the defendant will not be liable." In Cooley, Torts, section 70, the author says: "If the original wrong only becomes injurious in consequence of the intervention of some distinct wrongful act or omission of another, the injury shall be imputed to the last wrong, as the proximate cause, and not to that which was more remote." "A long series of judicial decisions has defined proximate or immediate and direct damages to be the ordinary and natural results of negligence such as are usual, and therefore might have been expected; and this includes in the category of remote damages such as are the result of an accidental or unusual combination of circumstances, which would not reasonably be anticipated, and over which the negligent party has no control." See Thomp. Neg., section 47.

Applying these well-recognized principles of law to the facts alleged by the defendant, can it be said that the condition of Second street, on the north side, at the point where the injury is alleged to have occurred, was the proximate cause of intestate's loss of life? It is not alleged that on the south side of the railway track the road was in any wise obstructed, or that the sidewalk on that side of Second street was not in suitable condition for the use of the public. But plaintiff does allege that the collision between his intestate and the trolley car occurred during the daytime, and that the motorman in charge of the car could

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by the exercise of ordinary care, have discovered her peril in time to have avoided striking her. If this allegation is true, plaintiff had a good cause of action against the trolley car company. If it is not true, and she voluntarily walked upon such track, or so close thereto as to be in striking distance from a passing car, without being on the lookout for the approach of a car, she was guilty of such contributory negligence as would preclude her from recovery. And it seems to us that in no contingency was the alleged negligence of the appellee the proximate cause of her injury and death. In view of the conclusion which we have reached upon this question, it is unnecessary for us to consider the question whether a municipal corporation can be made liable for damages for mere failure on the part of the city authorities to grade and pave a suburban street.

For reasons indicated, the judgment is affirmed.

Petition for rehearing by appellant overruled.

CASE 9—ACTION BY JESSIE NORTINGTON AGAINST A. D. SUBLETTE AND OTHERS FOR MANDAMUS.—OCTOBER 23.

Northington v. Sublette, &c.

APPEAL FROM BALLARD CIRCUIT COURT.

JUDGMENT DISMISSING PLAINTIFF'S PETITION AND SHE APPEALS. REVERSED.

SCHOOLS AND SCHOOL DISTRICTS—TEACHERS—EXAMINATIONS—GRADE—CERTIFICATES—ISSUANCE—DISCRETION OF SUPERINTENDENT—MANDAMUS.

Held: 1. While mandamus will not lie to compel the board of examiners of teachers to give a teacher any particular grade, yet

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where they have examined her papers and fixed her standing they have no further discretion and may be compelled by mandamus to issue her a certificate of the grade to which she is entitled.

2. Kentucky Statutes, section 4503, declares that a county teacher's certificate of the first class shall require an average grade of eighty-five per cent. Section 448 declares that words purporting to give authority to three or more persons shall be construed as giving such authority to a majority of them. **HELD**, that where two of the three members of the board of examiners decided that a teacher had passed an examination entitling her to a county certificate of the first class, the county superintendent had no discretion to refuse to issue a certificate of that grade to her.

G. W. REEVES, FOR APPELLANT.

The question in this case is, whether the appellant, Miss Jessie Northington, is bound by the second class certificate which was signed by the board of examiners and which she refused to accept.

The proof shows that the examination in spelling is the bone of contention. They all agree that in all the other branches her grade entitles her to a first class certificate.

Two of the examiners, Mrs. Dunn and Mr. Moore, both positively swear that appellant was entitled to a first class certificate, and that the reason why they signed a second class certificate was, that they knew that the certificate must be signed by the superintendent, or the appellant could not teach, and the appellee, Miss Sublette, was obstinate and flatly refused to sign any other than a second class certificate.

The appellant, in her petition, alleges that in her examination she attained an average grade of eighty-five per cent. in all the branches required by the common school law and in no branch thereof had she fallen below sixty-five per cent.

Mr. Moore and Mrs. Dunn, in their joint answer in substance, agree to the allegations of the petition, and express their willingness to sign a first class certificate.

Miss Sublette, in her separate answer admits the average of eighty-five per cent in all the branches except spelling, which she avers was below sixty-five per cent.

Our contention is, that a majority of the board having found appellant to be entitled to a first class certificate, she thereby becomes entitled to such certificate, although the third member of the board may refuse to agree with the majority

Whenever the grade of the applicant shows an average of

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eighty-five per cent. with no branch below sixty-five per cent., then the board is bound under the law to award a first class certificate.

There is no question as to the authority of the court to award a mandamus compelling the board to issue a certificate in accordance with the decision of the majority of the board.

AUTHORITIES CITED.

Kentucky Statutes, secs. 4422, 4425, 4503; Dassey County Judge v. Sanders, Sheriff, 17 R., 927; Day v. Justices of Fleming Co. Ct., 3 B. Mon., 198; Cassedy v. Young Co. Judge, 13 Rep., 512; Dew v. Sweet Spring Dist. Ct. Judges, 3 Hen. & M., 1 Va. (3 Am. Dec., 639); Jackson, &c. v. State of Nebraska, *Ex rel.* Thomas J. Majors, 42 L. R. A., 792; Dean v. Campbell, &c., 59 S. W., 294 (Texas).

BUGG & WICKLIFFE AND SHELBOURNE & KANE, FOR APPELLEE.

Our contention is:

1. The school board of examiners in Kentucky was created by statute to adjudge the grade of certificate to be awarded applicants for certificates to teach school, and no review can be had of their decision by the courts, however erroneous it may have been.

AUTHORITIES CITED.

Secs. 60, 63 and 133, Common School Law; Booe, County Judge v. Kenner, 20 R., 1343 and cases there cited; Anderson v. Likens, 20 R., 1001; Louisville v. Keen, 10 B. Mon., 17; Dickens v. Cave Hill, &c., 93 Ky., 389; Cassedy v. Young, 92 Ky., 227.

OPINION OF THE COURT BY JUDGE HOBSON—REVERSING.

This was an application by appellant, Jessie Northington, by her next friend, for a mandamus against appellees as the county board of examiners of teachers of the common schools of Ballard county, requiring them to issue to her a first-class certificate. She alleged that upon her examination it was found and determined by the board that her general average grade exceeded 85 per cent., and her lowest grade was above 65 per cent., and the board decided that she was entitled to a first class certificate, but the superintendent, from some unknown cause, refused to per-

mit the certificate to be issued to her. Appellees John M. Moore and Belle Dunn, two members of the board, filed answer, in which they, in substance, alleged that the statements of the petition were true. The third member of the board, appellee A. Dee Sublette, filed answer controverting the allegations of the petition. She afterwards filed an amended answer, in which she alleged that the plaintiff received aid in her examination. This was denied by a reply, and on final hearing the court dismissed the petition.

There is little conflict in the evidence—so little that the real facts in the case may be simply stated. There is no dispute that appellant was graded satisfactorily on every thing except spelling, and that she in fact made an average of 85 per cent. The only question is whether she made an average of 65 per cent. on spelling. Appellees Moore and Dunn decided that her grade on spelling was 70. Appellee Sublette held it to be 60, and refused to sign a first-class certificate. Appellees Moore and Dunn finally signed the second-class certificate, not because they had changed their conclusion, but because they thought it would be better to give a second-class certificate than none, and there was an understanding that the matter of the grade on spelling was thereafter to be settled. A referee to whom the matter was referred to by them decided the grade was 65, but appellee Sublette still refused to sign the certificate.

It is true mandamus does not lie to control a discretion. It only lies to compel ministerial action. It lies against the board of examiners to compel them to decide what grade a teacher has made, but it does not lie to compel them to give the teacher a certain grade. In other words, if they make a mistake in grading the teacher, that mistake can not be corrected by mandamus; for in grading the teachers they must exercise their own judgment, and

this can not be controlled by the courts. But when they have graded the teacher they have no further discretion. The statute prescribes the grade of certificate to be issued: "A county certificate of the first class shall require an average grade of eighty-five per centum upon all the subjects of the common school course and upon the science and art of teaching; and the lowest grade in any subject shall not be less than sixty-five per centum." Kentucky Statutes, section 4503. It therefore follows that if a teacher makes the required grade he is entitled to a first-class certificate, and the board, without special cause not alleged here, has no right to withhold it from him. By section 448, Kentucky Statutes, it is provided: "Words purporting to give authority to three or more public officers or other persons shall be construed as giving such authority to a majority of such officers or other persons." The majority of the board of examiners were therefore to determine the grade of any person examined by them, and the decision of the majority was as binding as if it had been made by the whole board. When this decision was rendered appellant became entitled to her certificate, and it was the duty of the superintendent to sign it and deliver it to her. In this she had no discretion. It was simply a ministerial duty.

As to the matter of receiving aid, it is sufficient to say that this is a matter committed to the board of examiners. Kentucky Statutes, section 4425. The board has not seen fit to act. Besides, as the record is presented, we see nothing in this.

Judgment reversed, and cause remanded, with directions to award the mandamus as prayed. No costs will be adjudged against the appellees Moore and Dunn in this court, nor in the lower court after the filing of their answer.

Petition for rehearing by appellee overruled.

Patterson v. Davis.

CASE 10—ELECTION CONTEST FOR COUNTY ATTORNEY.—OCTOBER 28.

Patterson v. Davis.

APPEAL FROM BELL CIRCUIT COURT.

JUDGMENT DISMISSING CONTESTANT'S APPEAL.

ELECTION CONTESTS—FAILURE TO EXECUTE APPEAL BOND.

Held: Under Acts, Ex-Session, 1900, page 40, section 12, Kentucky Legislature, relating to election contests and providing that "either party may appeal by giving bond to the clerk of the circuit court, conditioned for the payment of costs and damages," execution of the bond is made a condition precedent to a right of appeal, and unless said bond be executed within thirty days after final judgment in the circuit court, the appeal will be dismissed.

2. The execution of a *supersedeas* bond in this court is not a compliance with the statute.

N. B. HAYS ATTORNEY FOR APPELLANT.

We contend:

1. That section 12, of chapter 5, of the Acts of the General Assembly, passed at the extraordinary session 1900, does not require that appellant should execute a bond for costs in the circuit court within thirty days after final judgment of the circuit court. Said section simply provides that bond shall be executed in the circuit court with good security conditioned for the payment of all costs and damages the other party may sustain by reason of the appeal.

2. The appellant, on October 24, 1902, executed a bond for costs in this case with the clerk of this court which has been approved and accepted.

3. On October 23, 1902, and before this motion to dismiss was entered, the appellant, Patterson, executed his bond before the clerk of the Bell circuit court, conditioned that he would pay all costs and damages that the other party may sustain by reason of this appeal as required by the statute.

COOK & JONES, FOR APPELLEE.

The appellee moves the court to dismiss this appeal, because appellant failed to give the bond required by section 12 of

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chapter 5 of the Acts of the General Assembly, passed at the extraordinary session held in the year 1900, which section is as follows:

"Either party by appeal from the judgment of the circuit court to the court of appeals, by giving bond to the clerk of the circuit court with good surety, conditioned for the payment of all costs and damages the other party may sustain by reason of the appeal, and by filing the record in the clerk's office of the court of appeals, within thirty days after final judgment in the circuit court.

OPINION OF THE COURT BY JUDGE WHITE.

This is an appeal in a contested election case over the office of county attorney of Bell county. Appellee made a motion to dismiss the appeal because of failure of appellant to execute, within 30 days after the judgment, a bond to the circuit court, as required by the following provision of section 12 of the election act of 1900, viz.: "Either party may appeal from the judgment of the circuit court to the court of appeals by giving bond to the clerk of the circuit court, with good surety, conditioned for the payment of all costs and damages the other party may sustain by reason of the appeal, and by filing the record in the clerk's office of the court of appeals, within thirty days after final judgment in the circuit court." Acts Ex. Sess. 1900, p. 40. The bond was not executed within the 30 days to the circuit clerk. In our opinion, the requirement of this bond within the time is made a condition precedent to a right of appeal, and, unless complied with, an appellant has no standing in this court. The execution of a supersedeas bond in this court is not a compliance with the statute.

For failure to execute the bond as required, this appeal is dismissed.

Triple-State Natural Gas & Oil Company v. Wellman.

CASE 11—ACTION BY J. F. WELLMAN AGAINST THE TRIPLE-STATE NATURAL GAS & OIL COMPANY, FOR PERSONAL INJURIES—OCTOBER 29.

**Triple-State Natural Gas & Oil Company
v. Wellman.**

APPEAL FROM LAWRENCE CIRCUIT COURT.

JUDGMENT FOR PLAINTIFF AND DEFENDANT APPEALS. REVERSED.

NEGLIGENCE—EXPLOSION OF NATURAL GAS—COMPANY NOT INSURER OF ITS SAFETY.

- Held: 1. A company supplying natural gas to consumers is not an insurer of the safety of its product, so as to be responsible for a failure to keep it confined, where such failure is caused by the negligence of the person to whom the gas was furnished; but is only liable for a failure to exercise ordinary care.
2. Defendant company furnished natural gas to a mill, the pipes being so arranged that the gas passed through a "regulator," which reduced the pressure before the gas reached the meter. There was, however, a "by-pass," by which the gas could be turned into the meter at the full pressure of the main. Both the cock to turn the gas through the "regulator" and that to turn it through the "by-pass" were under the control of the mill owner. While plaintiff was leaving the mill after having been there to seek work, the owner of the mill, in turning on the gas, accidentally turned the cock admitting the full pressure, and the meter exploded, injuring plaintiff. HELD, that the only negligence was that of the mill owner, so that defendant was not liable for plaintiff's injuries.

JOSEPH P. O'BRIEN AND HAGER & STEWART, FOR APPELLANT.

J. F. Wellman, a married man, though an infant, who sues by his father and next friend, brought suit in which he claimed and recovered \$2,000 damages for personal injuries sustained by him, caused by an explosion of the gas company's meter at the mill of L. D. Boggs, at Louisa, Ky., alleged to have been the result of negligence upon the part of the gas company.

On January 8, 1900, Wellman, without any business and without invitation, went upon the property where Boggs was at

114	79
122	484
114	79
125	90
114	79
128	32

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work, and while there, by some carelessness on the part of Boggs or some one else in turning the wrong cock attached to the machinery, an explosion followed and Wellman was injured, and so it follows:

First. Either Boggs negligently turned the wrong cock allowing the gas to go through the by-pass with full force into the meter, or,

Second. It was turned by some third party not an agent or employe of the gas company, but a mere meddler and that the injury is attributable solely to one of these two causes.

We submit that whether turned by Boggs or a meddler, the injury resulting from the accident is in no way attributable to any negligence on the part of the gas company, and said company is in no way liable therefor.

Analyzing the allegations of the petition the negligent acts charged are:

1. The carelessness and negligence of the defendant in operating its pipe line and meter.

2. In carelessly and negligently failing to provide necessary valves and means to control the pressure of the gas in its pipes and meter.

3. In carelessly and negligently sending gas through its pipes and meter at much higher pressure and with much greater force than the valves, pipes and meter provided therefor would bear.

4. Carelessly and negligently sending through its pipes and meter a greater volume of gas than the means it had provided to control the pressure and action of gas would bear.

All of which by subsequent allegations in the petition, if strictly construed, is narrowed down and confined exclusively, to-wit:

5. By reason of the carelessness and negligence of the defendant, its agent and servants so operating its pipe line and furnishing gas to the mill as aforesaid, the explosion was caused and plaintiff injured as before described and not otherwise.

Now we submit that there is no allegation in the petition basing negligence upon any defect in the construction or the material of the regulator or the meter, nor that they or any of them were not properly boxed or protected from meddlers, or that there was no gauge upon the regulator, and all the evidence upon these matters was incompetent and irrelevant and prejudicial to appellant. The accident was clearly caused by the gas going around the regulator through the by-pass and into the meter, and it is wholly immaterial what the condition

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of the regulator was, as its condition neither contributed to nor would have prevented the accident. Hence, evidence as to a gauge upon the regulator was wholly immaterial and irrelevant.

We earnestly contend that the court erred in failing to peremptorily instruct the jury to find for the defendant on the ground that there was absolutely no evidence going to show that the defendant had been guilty of any negligence in any particular in any matter complained of in the petition.

We also insist that the court erred in its instructions to the jury, in failing to instruct as to the measure of damages, although asked so to do; no question was directed as to the probable permanency of the injury sustained. The whole matter was left to the jury for its speculation, and as a result, damages were awarded in the total sum claimed. The instructions were otherwise objectionable as will be readily seen by the court.

THEOBALD & THEOBALD, ATTORNEYS FOR APPELLEE.

The appellant was in the business of furnishing natural gas to persons along its line for fuel and light, and to Mr. Boggs for use in his mill. The regulator and meter were the property of appellant and were left in the custody of Boggs and he was directed to use them. They were necessary to the proper and careful operation of the line and required persons skilled in the business to look after them. The meter was to measure the quantity of gas used and the regulator and bypass to control the pressure. Boggs, an unskillful man, was placed in charge of these machines to operate them.

We contend that the cause of the explosion was that more gas was turned into the meter than it would bear and that this was done by Boggs who was appellant's agent, and the negligence of Boggs was the negligence of the appellant for whom he was acting. It was the duty of appellant to see that the pipe valves, meters and regulators were in order and protected. This it failed to do.

It can not be claimed that the verdict in this case is excessive, with the evidence showing the young man's suffering, his long confinement in bed and on crutches, and the permanent impairment of his leg, some parts of the bone being entirely gone.

We submit that there is no substantial error in the instructions, and the appellant can not complain of the failure of the court to instruct upon a particular point unless the instruction was asked for on such point.

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The instructions only directed the jury to find compensatory damages and it is clear that the damages given by the jury will not compensate him for the injury inflicted. We submit that under the pleadings any evidence was competent and relevant that would in any way show negligence or carelessness upon the part of appellant, its agents and servants operating its pipe line, meter, regulator and by-pass in Boggs' mill. Negligence is pleaded generally and the answer denies that appellee was injured by *any acts* of negligence of appellant, its agents or servants. We ask that the judgment be affirmed with damages.

AUTHORITIES CITED.

Louisville Gas Co. v. Gutenkuntz, 82 Ky., 432; Thomas' Admr. v. Maysville Gas Co., S. W. Rep., vol. 56, p. 153; C. & N. R. Co. v. Brown, 12 Rep., 468; Maysville & Lexington R. Co. v. Herrick, 13 Bush, 122; Heflin v. Auxler, 9 Rep., 535; E. & B. S. R. R. Co. v. Messer, 11 Rep., 486; Adams Express Co. v. Singleton, 7 Rep., 296; Newport Street Railway Co. v. Johnson, 2 Rep., 225; L. N. A. & C. R. R. Co. v. Davidson, 12 Rep., 142; L. & N. R. Co. v. Bullins, 15 Rep., 752; Ky. Central R. R. Co. v. Ackly, 87 Ky., 278; L. & N. R. R. Co. v. Howard, 82 Ky., 212; Tubb v. Cincinnati R. R. Co., 7 Rep., 528; Eskridge v. C. N. O. & T. P. R. R. Co., 89 Ky., 367; Fugate v. City of Somerset, 16 Re., 807; L. & N. R. R. Co. v. Wolf, 80 Ky., 82; C. N. O. & T. P. R. R. Co. v. Pemberton, 7 Rep., 676, 8 Rep., 169; L. & N. R. R. Co. v. Rains, 15 Rep., 423; C. & O. Ry. Co. v. Davis, by next friend, 22 Rep., 1156.

OPINION OF THE COURT BY JUDGE HOBSON—REVERSING.

Appellant is engaged in the business of supplying natural gas to Ashland, Ky., Huntington, W. Va., Ironton, Ohio, and other cities in that vicinity. Its wells are in Martin county, Ky., and it has a pipe line which passes through Louisa, Ky. At Louisa it furnished the gas to the sawmill of L. D. Boggs. There was a pipe running from the main to the mill, and just inside of the mill was a meter. Between the meter and the faucet to be used in turning on the gas for the mill was a regulator, which reduced the pressure so that the gas did not pass into the meter with

the full pressure that was on the main. Appellee, Wellman, had gone to the mill seeking work of Boggs. Just as Wellman was leaving the mill, Boggs went to turn on the gas. By oversight he turned the wrong cock, turning what was known as the "by pass," which turned upon the meter the full pressure of the main, which was 120 pounds. The meter exploded, and a piece of the meter struck Wellman on the leg, breaking it, and causing him other painful injuries, for which he sued, and recovered judgment against the gas company for \$2,000. The testimony on the trial took a wide range, but, without going into it minutely, we are satisfied it shows no negligence on the part of the company, unless it is responsible for the negligence of Boggs, or was an insurer of its gas, and is responsible, at all events, if it failed to keep it confined. Counsel for the appellee, realizing this, has rested his case on these two grounds, and we deem it unnecessary to extend the opinion by noticing other points on which evidence was introduced.

We do not think there is a reasonable doubt that the sole cause of the accident was Boggs' turning the wrong cock. The cock at the by-pass was found turned after the explosion. All was quiet until Boggs made the turn with a monkey wrench. Then a frying sound set up, which was immediately followed by the explosion. If it be true that the by-pass cock was already turned, and that Boggs turned only cock No. 1, admitting the gas to the meter, still the company would not be answerable for the explosion, unless it is responsible for the negligence of Boggs, because he had charge of the premises and of the turning on of the gas, and it was incumbent on him to see that all was right before turning it on. The case of *Rylands v. Fletcher*, L. R. 3 H. L., 330, is cited to the proposition that a party collecting or having any dangerous substance on his prem-

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ises is responsible at all events if it escapes and injures another; but that case has been very much modified by the later English cases, and is generally disapproved in this country. In the subsequent case of *Box v. Jubb*, 4 Exch. Div. 76, the defendants had a reservoir, which they used in operating their mill. The reservoir overflowed, and damaged the lands of the plaintiff by reason of a flood of water coming down from a reservoir, the property of a third person, at a considerable distance from the defendants' reservoir. The defendants were held not responsible. This case and *Nichols v. Marsland*, L. R. 10 Exch., 255, lay down the rule that, if the person who has collected the water has done all that reasonable care and skill can do, he is not liable for damage by acts over which he has no control, and that distinction must be drawn between the keeping of a tiger or other dangerous wild beasts, which get loose accidentally or by the fault of others, and a reasonable use of property in a way beneficial to the community. In *Losee v. Buchanan*, 51 N. Y. 476, 10 Am. Rep. 623, a steam boiler exploded from a secret defect, the fault of the boiler maker. It was held that the owner, who had used due care, was not responsible to an adjoining proprietor, whose buildings were damaged by the explosion. See, also, *Gas Co. v. Kaufman* (20 R. 1069), 105 Ky., 131 (48 S. W. 434). In *Flint v. Gaslight Co.*, 3 Allen, 243; *Id.*, 9 Allen, 552, a gas-fitter, who was putting the pipes and fixtures in a house, turned on the gas before one of the pipes was closed with the proper fixture. By reason of this an explosion occurred. The gas fitter had been in the employment of the company, but had left it. It was the duty of the company to turn on the gas, and there were circumstances from which it might be inferred that it gave the gas fitter permission to turn the gas on when he got ready. It was held that from

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this fact an agency to act for the company was not to be presumed, and that the defendant was not liable for the act of the gas fitter merely from the fact that it permitted him to turn the gas on. In *Schmeer v. Gaslight Co.*, 147 N. Y., 529, 42 N. E. 202, 30 L. R. A. 653, the gas was turned on from the street when the piping in the upper hallways had not been properly attended to. The gas escaped, and caused an explosion. The gas in this case was turned in by a gas fitter, who had completed his contract on the lower floor, and did not know of the condition of the pipes above. It was held that there was no liability on the part of the company, unless it was itself negligent in the premises. The doctrine of these cases is approved in *Brown v. Collins*, 53 N. H. 442, 16 Am. Rep. 372; *Blenkiron v. Gas Consumers Co.*, 2 Fost. & F. 437; 2 Shear. & R. Neg., sec. 728; 1 Thomp. Neg., secs. 706, 719; note to *Fuel Co. v. Andrews* (Ohio), 29 L. R. A., 337 (s. c. 35 N. E. 1059); *Barrickman v. Oil Co. (W. Va.)*, 32 S. E. 327, 44 L. R. A. 92, and cases cited. The authorities lay down the rule, as gas is a useful article, almost indispensable in modern life under many circumstances, the manufacture and sale of it is not an illegal act; and that the company in supplying this necessity to its customers is bound only to exercise such care and skill in its management as the dangerous character of the substance and the attending circumstances demand of a person of ordinary prudence. The case of *Thomas' Adm'r v. Gas Co.* (21 R., 1690), 56 S. W., 153, was not intended to lay down any other rule. That case is rested upon the ground that those using such a death-dealing force as electricity must use the utmost care to avoid injury to those who are required to come near it. The injury in that case occurred on a city street, where for days a live wire had been permitted to hang, imperiling life. The safety of the travel-

ing public upon the streets demands that he who sends along the streets of a city such a deadly thing as a strong current of electricity should not be acquitted of responsibility by a contract with an insolvent person to deliver the electricity to him at the factory. The case here, though, is entirely different. The gas was properly confined in the main. It did not get out of the main by any fault of the company. It escaped from the main by the fault of the customer, Boggs, in improperly turning it on. This was on his own premises; and, while the meter was the property of the company, it was in the possession of Boggs, and it was placed there for his use. He was not the agent of the company in turning it on. He turned it on for himself in the execution of his own purposes. The company was in no wise responsible for his acts, and while Boggs might be responsible to appellee, there is no reason for holding appellant liable. *Bartlett v. Gaslight Co.*, 117 Mass. 533. 19 Am. Rep. 421.

The verdict is palpably against the evidence. The court should have peremptorily instructed the jury to find for the defendant at the conclusion of the testimony.

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CASE 12—ACTION BY NEWPORT NATIONAL BANK AGAINST NEWPORT BOARD OF EDUCATION FOR BREACH OF CONTRACT FOR PURCHASE OF BONDS.—OCTOBER 31.

Newport National Bank v. Board of Education of Newport.

APPEAL FROM CAMPBELL CIRCUIT COURT.

JUDGMENT FOR DEFENDANT AND PLAINTIFF APPEALS. REVERSED.

NATIONAL BANKS—POWER TO PURCHASE CORPORATE BONDS.

Held: Under the National Banking Act, Rev. St., U. S., section 5156 (Comp. St. U. S., 1901, p. 3455) giving national banks all such incidental power as shall be necessary to carry on the business of banking by "discounting and negotiating" promissory notes, drafts, bills of exchange, and other evidences of debt, a national bank has power to purchase bonds issued by the board of education of a city.

L. J. CRAWFORD, ATTORNEY FOR APPELLANT.

The sole question arising on the demurrer, is whether or not the contract set out in the petition is or is not *ultra vires*.

The National Bank Act gives to a national bank the power "to exercise by its board of directors, or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking; by *discounting and negotiating* promissory notes, drafts, bills of exchange and *other evidences of debt*; by receiving; by buying and selling exchange, coin bullion; by loaning money on personal security; and by obtaining, issuing and circulating notes according to the provisions of this title; but no association shall transact any business except such as is incidental and necessarily preliminary to its organization until it has been authorized by the comptroller of the currency to commence the business of banking." Revised Statutes, U. S., section 5136.

It has been held that national banks have no right to purchase *stocks* except to indemnify themselves against loss from a previous loan, but stock in national banks or other corporations is neither a promissory note, draft, bill of exchange or other evidence of debt, and is therefore not in the list of securities in which a national bank may lawfully deal, but a

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bond, whether national or municipal, is *an evidence of debt* (and we believe no authorities need be cited on this proposition) and is within the list of securities which a national bank may acquire by "discounting and negotiating."

In the case at bar, defendant was endeavoring to make a loan by depositing its bonds (which were evidences of debt) upon the best terms it could, and there is nothing to show that appellant bank has not a surplus to invest, or money to loan out in that manner.

We think the correct meaning of the word "negotiate," as used in the aforesaid act is, to transfer, sell, to pass, to procure by mutual intercourse and agreement with another, to arrange.

AUTHORITIES CITED.

U. S. Rev. Statutes, sec. 5136; Leach v. Hale, 31 Iowa, 69; Yerkes v. Bank, 69 N. Y., 383; Anderson's Dictionary of Law, 1893, word negotiate.

JAMES C. WRIGHT AND WRIGHT & ANDERSON, FOR APPELLEE.

The appellee denies the right of appellant to go into the market and bid for and buy municipal bonds. It contends that power to do so is not given it by the national banking laws, and that all the acts set out by it in its petition whereby it attempted to acquire said bonds were and are *ultra vires* and void, and that the contract thus attempted to be made being wholly unexecuted, appellee can avail itself of this defense.

The appellant is a corporation created by statute, and whatever may have been the powers of corporations at common law, it is now well settled that statutory corporations must look alone to the statute of their creation for their powers.

AUTHORITIES CITED.

1. The charter of a corporation is the measure of its powers, and the enumeration of those powers is the exclusion of all others. Head & Armory v. The Providence Ins. Co., 2 Cranch, 127; Bank of U. S. v. Dandridge, 12 Wheaton, 64; Geo. W. Thomas, &c. v. West Jersey R. R. Co., 101 U. S., 71; Penn R. R. Co. v. St. Louis, &c. R. R. Co., 118 U. S., 91; Oregon Riv. Nav. Co. v. Oregonian Ry. Co., 130 U. S., 1; Cov. Gas Light Co. v. City of Cov., &c. 22 Ky. Law Rep., 801; Jessamine Co. v. Swigert's Admr.; Same v. Newcomb-Buchanan Co., 8 Ky. Law Rep., 692; Thweatt, &c. v. Bank of

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Hopkinsville, 4 Ky. Law Rep., 557; Maddox, &c. v. Graham & Knox, 2 Met., 72 Ky.

2. Power of national banks to buy bonds in the market. Logan County Nat. Bank v. Townsend, 139 U. S., 67; California Nat. Bank v. Kennedy, &c., 167 U. S., 362; First Nat. Bank v. Exchange Bank, 92 U. S., 122; First Nat. Bank of Concord v. Hawkins, 174 U. S., 364; First Nat. Bank v. Anderson, 172 U. S., 573; Talmadge v. Pell, 7 N. Y., 328; Weckler v. First Nat. Bank of Hagerstown, 42 Md., 518; Shinkle & Wife v. First Nat. Bank, 22 O. St., 516; First Nat. Bank v. Pierson, 24 Minn., 140; Farmers' & Mech. Bank v. Baldwin, 23 Minn., 198.

3. The right of appellee to plead and rely upon *ultra vires*, as a defense. Cent. Transportation Co. v. Pullman Car Co., 139 U. S., 24; Thomas v. West Jersey R. R. Co., 101 U. S., 71; P. C. & St. L. R. R. Co. v. K. & H. Bridge Co., 131 U. S., 371; Ashbury R. R. Co. v. Richie, L. R. 7, H. L., 553; Nat. Home B. & L. A. v. Home Sav. Bank, 181, Ill., 25.

OPINION OF THE COURT BY JUDGE HOBSON—REVERSING.

In the month of February, 1900, the board of education of the city of Newport, being in debt in the sum of \$27,200, decided to issue for the purpose of funding the debt its bonds of that amount, maturing at the end of 40 years, redeemable after 20 years at its option, and bearing interest at the rate of 4 per cent. per annum. The Newport National Bank bid for all the bonds, and offered therefor \$27,945. This offer the defendant accepted, and agreed to deliver the bonds to the bank, but thereafter refused to carry out its contract, and sold the bonds to other persons. Thereupon the bank filed this suit for damages for the breach of the contract. The circuit court sustained a general demurrer to the petition on the ground that a national bank has no power to make such a contract, and therefore was not bound by it.

A corporation can engage in no business not authorized by its charter. Its powers are only such as are conferred by the statute, and an enumeration of its powers in the statute is an exclusion of all others. Covington Gaslight

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Co. v. City of Covington (22 R., 796) 58 S. W., 805, and cases cited. The powers of a national bank are derived from the act of Congress, and, so far as material to the question before us, are as follows: "To exercise by its board of directors or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange and other evidences of debt; by receiving deposits; by buying and selling exchange, coin and bullion; by loaning money on personal security, and by obtaining, issuing and circulating notes according to the provisions of this title." Rev. St. U. S., section 5136 [Comp. St. U. S., 1901, p. 3455]. It will thus be seen that express power is conferred to carry on the business of banking by discounting and negotiating promissory notes, bills of exchange, and other evidences of debt. The board of education is a corporation created by the laws of this State, and its bonds are manifestly evidences of debt, and the transaction in question is therefore authorized by this provision of the national banking act, if the purchase of the bonds by the bank is warranted by the words "discounting and negotiating." It is urged that the bid of the bank, being for more than the face of the bonds, was not a discounting of the bonds within the fair meaning of that term. Without stopping to inquire whether this is true or not, we are satisfied it is warranted by the word "negotiating," which is a general word coming to us from the Latin, and signifying to carry on negotiations concerning and so to conduct business, to conclude a contract, or to transfer or arrange. The two expressions "discount and negotiate," taken together, have a broader meaning than the word "discount" alone, and seem to us to have been used designedly by Congress to authorize

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these fiscal agencies to invest their surplus in promissory notes, bills of exchange, and other evidences of debt so as to make it remunerative. In *Leach v. Hale*, 31 Iowa, 69, 7 Am. Rep., 112, a national bank received United States bonds of one class on deposit under an agreement to exchange them for those of another class, and failed to make the exchange. It was held that the transaction was not *ultra vires*. The court said: "It is the policy of the government to encourage the purchase and sale of its bonds and to facilitate transactions in them, for thereby their value will be enhanced, and the credit of the government is a measure promoted. It is not probable that Congress intended to impose restrictions upon the national banks, the most numerous class of financial agents in the country, which would operate to prohibit dealing in the securities of the government in a manner usual among bankers and banking institutions. The effect of such legislation, it is apparent, would tend to discourage transactions in these securities, and in a measure operate to lessen their value." This case was followed by the court of appeals of New York in *Yerkes v. Bank*, 69 N. Y., 382, 25 Am. Rep., 208; and it has also been held that, as interest coupons attached to municipal bonds are evidences of debt in the nature of promissory notes, a national bank may deal in them. *Bank v. Bennington*, 16 Blatchf., 53, Fed. Cas. No. 4,807. Every reason which sustains the power of a national bank to deal in the bonds of the United States or interest-bearing coupons of municipal bonds applies with equal force to its purchase of corporate bonds, for one is precisely an evidence of debt just as the other, and the purchase of one is no less a negotiation than the purchase of the other. The same reasons of public policy, too, apply in one case as the other. A large part of the capital of the country

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is invested in national banks, or controlled by them, and, if none of this capital could be applied to the purchase of municipal or corporate bonds, then the value of these securities would be greatly impaired, and much injustice will be done to the municipalities of the country. In *Bank v. Boyd*, 44 Md., 47, 22 Am. Rep., 35, a customer deposited with a national bank certain municipal coupon bonds as collateral security for a debt then existing. After the debt was paid off, the bonds were left with the bank on the idea that they should be a security for any future indebtedness. When such indebtedness did not exist, the bonds were stolen from the bank, and it relied upon the plea of *ultra vires* to defeat the responsibility for them. It was held responsible, and the power of the bank to take such bonds as collateral security for a debt was upheld. The power to hold municipal bonds as collateral security for a debt not created is no more fairly within the implied power to carry on a banking business than the power to buy such bonds outright. The case of *Bank v. Pierson*, 24 Minn., 140, 31 Am. Rep., 341, is not approved.

Judgment reversed, and cause remanded, with directions to overrule the demurrer to the petition.

dner v. Ballard, &c.

CASE 13—ACTION BY W. G. GARDNER AGAINST C. N. BALLARD, &C. TO RECOVER MONEY BET CONSOLIDATED WITH PROCEEDINGS BY THE COMMONWEALTH AGAINST SAID DEFENDANTS TO RECOVER A FINE AND FORFEITURE—OCTOBER 31.

Gardner v. Ballard, &c.

APPEAL FROM MARION CIRCUIT COURT.

JUDGMENT OF FORFEITURE, AND DISMISSING GARDNER'S ACTION AND HE APPEALS. REVERSED.

GAMING—BETTING ON ELECTION—CIVIL ACTION—PENALTIES AND FORFEITURES—RIGHT OF STATE—RIGHTS OF PARTIES—CONSOLIDATION OF ACTIONS.

Held: 1. Kentucky Statutes, section 1959, declares that, if a stakeholder of a bet refuse to return the same on demand, the amount may be recovered by the party aggrieved; while section 1975 imposes a fine of \$100 for betting on an election, and enacts that, if the winning party has received the stakes, the sum shall be forfeited to the Commonwealth. The loser of an election bet demanded the return of his money of the stakeholder, who paid the money to the winner, and proceedings by the State to recover the fine and forfeiture were united with an action by the loser to recover the deposit. HELD, that the loser's demand for the money revoked the bet, and the receipt of the money by the winner could not be considered as of money won on a bet; therefore it was error to dismiss the loser's action and decree the forfeiture to the State.

H. P. COOPER, FOR APPELLANT.

BEN SPAULDING, FOR APPELLEE.

(No briefs).

OPINION OF THE COURT BY JUDGE BURNAM—REVERSING.

On the 4th day of January, 1901, the appellant, W. G. Gardner, instituted this suit against the appellees, C. N. Ballard and Elam Perkins, and alleged as his cause of action that in October, 1899, he made a bet of \$100 with the appellee Elam Perkins on the result of the gubernatorial

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election, which was to take place the following November; and that by agreement each of them deposited \$100 so wagered with the defendant C. N. Ballard; but that in January, 1900, thereafter, and whilst the money was still in the possession of the stakeholder, Ballard, he demanded that the \$100 so posted should be returned to him, which Ballard failed and refused to do, but soon thereafter, over his protest, and in violation of his rights, turned his \$100 over to the defendant Perkins; and prayed judgment for \$225 and costs. Ballard, in his answer, states that in October, 1899, the plaintiff, W. G. Gardner, and Elam Perkins each placed in his hands \$100, with instructions that the whole amount should be turned over to Perkins if W. S. Taylor was elected governor at the ensuing November election, and to Gardner if Wm. Goebel was elected governor; that, after Taylor had qualified as governor, he turned over the fund as directed to Perkins. He admits, however, that when Gardner notified him not to pay the money to Perkins he had the money in his possession. Whilst this action was pending on the docket the Commonwealth of Kentucky, in January, 1900, instituted a suit against Gardner, Perkins and Ballard for the purpose of having a fine of \$100 imposed upon both Gardner and Perkins, and asked that the \$200 deposited with Ballard be forfeited to the Commonwealth. On motion of the Commonwealth's attorney, this cause, over the objection of Gardner, was consolidated with the suit of Gardner against Ballard, etc., and a judgment rendered in the consolidated suits, forfeiting to the Commonwealth the money so posted, and the suit of Gardner against Ballard was dismissed, and from that judgment the plaintiff, Gardner, prosecutes this appeal.

By section 1955 of the Kentucky Statutes, "every con-

tract for the consideration of money lost or bet at any game, sport, pastime or wager, is declared absolutely void." Section 1959 provides: "The stakeholder of any money or other thing that may be staked on any bet or wager, shall when thereto notified return the same to the person making the stake or deposit, and for failing to do so, the amount or value of the stake may be recovered from him by the party aggrieved." And section 1975 provides: "If any person shall wager or bet any sum of money or any thing of value upon any election under the Constitution and laws of this Commonwealth, or the Constitution and laws of the United States, he shall be fined \$100.00, to be recovered in any county where the parties so offending may be found; or where the bet is made; and in addition to the fine if the person winning shall receive the sum of money or other thing so paid or its value or anything therefor, the sum of money or value of any thing else received shall be forfeited to the Commonwealth; and may be recovered by an appropriate action in the name of the Commonwealth before the circuit court or the presiding judge of the county court wherever the fund to be forfeited may be found." The bet was on an election, which is by the statute declared to be illegal and void, and it was the duty of the stakeholder, Ballard, to have returned to the appellant, Gardner, the \$100 deposited by him upon demand, and upon his failure to do so Gardner was entitled to recover it. The fact that the conditions of the bet had been determined at the time the demand for a return of the money was made upon Ballard is wholly immaterial. The demand made by Gardner upon Ballard for the return of the money operated *eo instanti* as a revocation of the bet and any authority previously given to Ballard to turn it over to Perkins. The bet having been drawn by Gard-

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ner, Ballard held the funds from this time forth not as a stakeholder, but as an individual, and in violation of Gardner's rights. And the receipt by Perkins under this state of fact of the money cannot be considered as the receipt of money won upon a bet. If it were otherwise, we would have a state of case in which Gardner could recover the \$100 posted with Ballard, and the Commonwealth could recover the same \$100 as a forfeit in the hands of Perkins. It follows that the trial court erred in failing to adjudge the appellant, Gardner, his \$100, and in forfeiting to the Commonwealth the money posted in Ballard's hands and turned over to Perkins.

For reasons indicated, the judgment is reversed, and cause remanded for proceedings consistent with this opinion.

CASE 14—ACTION BY J. T. S. JOHNSON AGAINST J. H. BRAFFORD AND ANOTHER.—OCTOBER 30.

Johnson v. Brafford, &c.

APPEAL FROM JEFFERSON CIRCUIT COURT, LAW AND EQUITY DIVISION.

JUDGMENT FOR DEFENDANTS AND PLAINTIFF APPEALS. AFFIRMED.

ACTIONS—PARTIES—JOINDER—SERVICE OF PROCESS—JURISDICTION OF PARTIES.

Held: 1. Where an action alleged a breach of contract against a party residing and summoned in the county in which the action was brought, and therewith joined another party residing and summoned in another county alleging a separate cause of action against him, such cause of action being improperly joined, the court acquired no jurisdiction of the defendant so improperly joined by reason of service of process on him in another county under section 78 and section 85 civil code of practice.

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2. Where the quarterly court acquired no original jurisdiction of a party by service of process on him in a county other than that in which the suit was brought, in an action in which he was improperly joined with a party residing in the county in which the suit was brought, the fact that he was thereafter properly served with process on appeal to the circuit court, brings him before such court only to the extent that he was before the quarterly court.

JAMES T. A. BAKER AND JOHN ROBERTS, ATTORNEYS FOR APPELLANT.

STATEMENT OF PRINCIPLES DISCUSSED AND AUTHORITIES CITED.

1. Where two persons are jointly sued, one served in a county other than that where the suit is brought, there can be no dismissal of the suit as to non-resident defendant until the case is decided in favor of the resident defendant. Section 80, Civil Code.

2. The remaining question involved in this case is that the infringement of the patent was not brought in question by the petition and could not be brought in question by either of the defendants. *Billings v. Ames*, 32 Mo., 265, Middlebrook, Broadbent, 47 N. Y., 447; *Havana Press Drill Co. against Ashurst*, 148, p. 39; *Rice v. Garnhardt*, 34 Wis., 453; *Hartell v. Tilghman*, 99 U. S., 547; *Marsh v. Nichols, Shepard & Co.*, 140 U. S., 344.

W. B. THOMAS, FOR APPELLEE.

JOHN BARRET, OF COUNSEL.

POINTS AND AUTHORITIES.

1. In order to acquire jurisdiction under section 78 of the Civil Code over a defendant summoned in a county other than the county in which the action is pending, three things must concur:

- (1) A cause of action must be alleged against the defendant summoned in the county in which the action is instituted.

- (2) The court in which the action is instituted must have jurisdiction of the cause of action stated against the defendant summoned in the county in which the action is instituted.

- (3) The absent defendant must be jointly interested in the cause of action stated against the defendant summoned in the county. Sec. 78 Civil Code; *Ransdall v. Shropshire*, 4 Metcalfe, 327; *Baye v. Brown*, 78 Ky., 553.

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2. A State tribunal has no jurisdiction of a suit for infringement of patent rights. *Simond's Summary on Law of Patents*, pp. 240-1-2; *Mitchell v. Tilghman*, 19 Wallace, 378.

3. The jurisdiction of a circuit court on appeal depends upon the jurisdiction of the inferior court. *Lane v. Young*, 1 Littell, 40; *Mitchell v. Warden*. 5 Monroe, 263; *Fidler v. Hall*, 2 Metcalfe, 461.

OPINION OF THE COURT BY JUDGE O'REAR—AFFIRMING.

Appellant filed this suit in the quarterly court of Jefferson county to recover \$200 damages of the defendant, J. H. Brafford and "— Brumfield," so styled in the caption. The cause of action asserted in the petition was: Plaintiff alleged that J. H. Brafford had sold and assigned to him an exclusive right to sell a patented article in Jefferson county, this State. Plaintiff alleged "that afterwards the defendants J. H. Brafford and Brumfield, as partners, in disregard of said plaintiff's right, sold and erected the said patented article to divers and various parties," to plaintiff's damage as stated. Summons on this petition directed to Jefferson county was executed on O. Brumfield by the sheriff of Jefferson county. Brumfield failed to answer, and the petition was taken as true. Brafford claims to have resided in Fayette county, and summons was served on him in Fayette county. He entered a special appearance in the Jefferson quarterly court, and moved to quash the summons that was served upon him by the sheriff of Fayette. He also filed a special demurrer to the petition on these grounds: "(1) Because the Jefferson quarterly court has no jurisdiction of the person of J. H. Brafford. (2) Because the Jefferson quarterly court has no jurisdiction of the cause of action alleged against the defendant O. Brumfield." The quarterly court sustained the motion and demurrer. The plaintiff failing to take other steps, the cause was dismissed as to

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Brafford. The plaintiff appealed to the Jefferson circuit court, which also sustained the demurrer and the motion to dismiss, and plaintiff has appealed here.

The petition at best is only an attempt to recover from Brafford damages alleged to have been sustained by the plaintiff because of Brafford's breach of a contract between him and plaintiff. Brumfield is not alleged to have been a party to that contract; therefore, so far as this case is an action upon the contract, Brumfield was not properly joined as a party defendant. This is a transitory action, and, under section 78 of the Civil Code of Practice, "may be brought in any county in which the defendant, or in which one of several defendants, who may be properly joined as such in the action, resides or is summoned." Brumfield was improperly joined as a party defendant, manifestly for the purpose of conferring a jurisdiction upon the courts of Jefferson county against Brafford that the law did not authorize. The judgment quashing the service of process upon this ground was right. *Basye v. Brown*, 78 Ky., 553. Section 113 of subsection 2 of the Civil Code of Practice allows a pleading to contain statements of as many causes of action as there may be grounds for in behalf of the pleader. But section 85, Id., provides that several causes of action may be united only in event each affects all the parties, and the action may be brought in the same county, etc. If there is a cause of action stated at all against Brumfield, or even imperfectly stated against him, it is to recover damages because of his infringement or interference with the plaintiff's exclusive right to manufacture and sell a patented article, under the laws of the United States. Suits for infringements or interferences with, or to vacate, or to repeal, patents must be brought in the United States courts. However, the State courts

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have jurisdiction to enforce contracts relating to patents, such as contracts to assign, or covenants contained in contracts for the use of patented articles, as well as of actions to recover damages for the breach of such contracts by parties thereto. Sim. Pat. Law, 240-242; *Mitchell v. Tilghman*, 19 Wall, 278, 22 L. Ed., 125; *Billings v. Ames*, 32 Mo., 272; *Marsh v. Nichols, Shepard & Co.*, 140 U. S., 353, 11 Sup. Ct., 798, 35 L. Ed., 413. So far as the petition attempted to allege a cause of action against Brafford, it was for the breach of the contract concerning a patent, the subject-matter of which action was within the jurisdiction of the Jefferson quarterly court; but, so far as the petition attempted to allege a cause of action against Brumfield, it was, if anything, for an interference with, or infringement of, the exclusive right of an assignee of a patented article to manufacture and sell same; therefore was an act exclusively within the jurisdiction of the federal courts. In *Randall v. Shropshire*, 4 Metc., 327, this court held that where two or more causes of action were improperly joined under a section of the old Code (section 111, which is the same as section 83 of the present Civil Code of Practice), and service was had upon one of the defendants in the county where the action was begun, the court would not take jurisdiction under section 106 of the old Code, similar to section 78 of the present Civil Code of Practice, in a transitory action of defendants served out of the county who were not proper parties to the cause of action set up against the defendants summoned in the county. So it follows that, in any view of the case, the quarterly court and the circuit court ruled correctly in sustaining the motion to quash the summons.

The record shows that when Johnson appealed to the circuit court he caused a summons on the appeal to issue to

Jefferson county, in which the defendants were summoned to answer the appeal. The return of the sheriff shows that this summons was executed upon appellee Brafford by the sheriff of Jefferson county. Although it is stated in the brief of appellee that this is an error, we must accept the record as it is for the purposes of this appeal. We are of opinion, however, that this service did not bring appellees before the court in Jefferson county, even if it had as stated, for any other purpose, or to any other extent, than to give the Jefferson circuit court jurisdiction to hear and determine the original controversy as it was in the Jefferson quarterly court immediately before the trial there. Although, under section 726 of the Civil Code of Practice, appeals to the circuit court from judgments of quarterly and justices courts shall be docketed and stand for trial as ordinary actions, and shall be tried anew as if no judgment had been rendered, we think that the service of the summons upon the appeal is merely an incident of the appeal, and does not affect other rights of the litigants. It brings the party upon whom it is executed before the circuit court to the extent only that he was before the court below. Section 724 of the Civil Code of Practice, directing how such appeals may be taken, says: "And the appellee shall be summoned, actually or constructively, as is provided in chapter 2 of title 4, to appear and defend the appeal." If the judgment in this case had been in favor of the plaintiff, against the defendant, upon the record as it appeared when filed in the circuit court, and the defendant had executed the bond, and prosecuted the appeal, as provided in section 724, and no other steps had been taken, the court would have been compelled to adjudge the rights of the parties as based upon the record brought up from the quarterly court. That would neces-

sarily have been to have quashed the service of the summons. If the plaintiff then desired further steps to be taken, he would have been compelled to have had a new summons issued, and served in Jefferson county. Railroad Co. v. Sanders, 11 Ky. Law Rep., 53, a case decided by the superior court. Or, if under section 724 the summons issued upon the appeal can not be served upon the adverse party by an actual service, it might be constructively served as provided in the Code, for constructive service upon absent defendants. Such a service, while giving the court jurisdiction of the case to adjudge the rights of the parties according to the original record, would not, of course, bring the party so served before the court so as to authorize a personal judgment against him unless he had been before the court below by actual service or appearance, so as to justify such a judgment. We are of opinion that, when the summons upon the appeal has been served on the appellee, its office is fulfilled, and it can neither enlarge the rights of the litigants, nor detract from them as they stood before the service, other than to transfer to the circuit court jurisdiction of the case, and thereby suspend for the time the judgment appealed from. The correctness of this view becomes even more apparent when it is remembered that a summons on appeal may be served in any county. Now if service of the summons to answer the appeal has the effect to bring the appellee before the court for all purposes, regardless of whether he was before the court below, it would follow that one in appellee Brafford's attitude, by the very practice indulged and condemned in this case, could be successfully sued in a county and court not authorized by the provisions of section 78 of the Civil Code of Practice. We are further of opinion that, when the lower court had jurisdiction of the subject-

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matter, the appellate court (the circuit court in this instance) might have caused an alias summons to be issued on the petition (or statement), and served as if the case had originally been brought in such higher court. But there was no motion for alias summons in this case; consequently, it was not error for the court to dismiss the action.

Judgment affirmed.

CASE 15—ACTION BY MARY PETRIE AGAINST S. H. CARTWRIGHT, CITY MARSHAL, FOR THE UNLAWFUL KILLING OF HER HUSBAND. NOVEMBER 12.

Petrie v. Cartwright.

APPEAL FROM TODD CIRCUIT COURT.

JUDGMENT FOR DEFENDANT AND PLAINTIFF APPEALS. REVERSED.

PEACE OFFICER—RIGHT TO KILL—LIABILITY—ARREST—ATTEMPT TO ESCAPE—EVIDENCE—RES GESTAE.

- Held: 1. Criminal Code of Practice, sections 36 and 43, authorizing a peace officer to make an arrest without a warrant where he has reasonable grounds for believing that the person arrested has committed a felony, such officer without a warrant is not justified in shooting a man while fleeing to escape arrest for an offense less than a felony.
2. Where plaintiff and her sister were insulted by two men, and plaintiff having informed her husband of the insult, he followed and accosted the men and struck one of them and a scuffle ensued, whereupon, an officer came up and plaintiff's husband being advised to run, did so, and on refusing to stop at the command of the officer, was shot and killed by such officer; in an action by the wife against the officer to recover damages for the alleged wrongful killing of her husband, evidence as to what took place between the men and plaintiff and her sister was admissible as part of the *res gestae*.

114	103
123	235
114	103
137	554

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PETRIE & STANDARD, ATTORNEYS FOR APPELLANT.

Joe Petrie, while protecting his wife and sister from the most outrageous insults, was assaulted with a deadly weapon, and, being frightened, flees to save his life, and is deliberately shot down by a peace officer. It was a deliberate and cruel act, and when arraigned civilly in a suit for damages, he is shielded by an instruction of the court which makes him the sole arbiter of the lives of his fellow beings.

We insist that this case should be reversed for the following reasons:

1. Because the court erred in refusing to permit appellant to prove that just prior to the killing, two men, Blye and Crouch were following her and making indecent proposals to her and that said conduct was communicated by her to her husband.
2. Because the answer of the appellee is defective in failing to state that he believed and had reasonable grounds to believe that deceased had committed a felony.
3. Our contention is, that in no case where the offense is a misdemeanor, is an officer, without a warrant of arrest, justifiable in killing the offender, who is fleeing to escape, although he may believe in good faith and have reasonable grounds to believe, that such offender has committed a felony.

AUTHORITIES CITED.

Head v. Martin, 9 R., 45; Dilger v. Com., 11 R., 67; 3 Ency., p. 892 and notes; Conraddy v. People, 5 Park Crim., N. Y., 234.

C. A. DENNY, ATTORNEY FOR APPELLEE.

The testimony shows that Joe Petrie, after being told by his wife that Blye and Crouch had insulted her, immediately turned and followed them and finding Crouch in front of the pool room door looking in, without a word of warning struck him on the head from behind with something that was sufficiently heavy and deadly to knock him across the broad pavement and out into the street under a buggy and render him senseless; that appellee, who was twenty-five yards away heard the licks that Petrie was inflicting upon Crouch and saw him fall apparently dead, and saw the negro run, and he, appellee, with his official uniform on ran into the light and halted Petrie, and Petrie, seeing him, ran around him and started down the street away from town; the first shot was fired on the ground as a warning to Petrie before he passed appellee and the other shot was fired as the last and only means of apprehending him.

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1. We claim that the offense was committed in the presence of the peace officer, and under the law he had the right to make the arrest without a warrant.

2. That he had the right to make the arrest without a warrant if he had reasonable grounds for believing that Petrie had committed a felony.

Out of necessity, the officer, in a case like this, is given the right to determine in his own mind what offense the fleeing party is guilty of, and if he has reasonable grounds for believing him guilty of a felony he has the right to use all the force necessary to apprehend him.

OPINION OF THE COURT BY JUDGE HOBSON—REVERSING.

The appellant, Mary Petrie, was going to her home in Elkton, Ky., after night, in company with her husband's sister, Mary Belle. They were followed by two men, named Blye and Crouch; the latter proposing sexual intercourse, and making an exposure of his person. They hurried on, and met Joe Petrie, the husband of Mary. She told him of the conduct of the men, and he immediately went back up the street in the direction of them. When he overtook them, he asked Crouch what he had insulted his wife for. Crouch said, "Damn your wife, and you, too." Petrie then struck him. A scuffle followed, and Crouch fell. Crouch and Blye were white men. Petrie was a negro. The difficulty came up just in front of a billiard saloon. Blye was cutting at Petrie with his knife. Some one called out to Petrie to run, which he did. Appellee Cartwright, who was the city marshal, was in sight a few yards off, and, seeing Crouch fall, as Petrie ran past called to him to halt, and, when he did not stop, fired his pistol in the ground. He then fired a second time, taking aim at Petrie, and killing him. Petrie's clothes were cut behind. His clothing was cut through and through, and his skin scraped. These cuts were made by Blye while he was scuffling with Crouch. Although the officer called to Petrie twice to stop, he does not appear to have heard him. Neither recognized the

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other in the dark. Crouch was very drunk, so that he had no recollection of what occurred. He was bruised on the back of the head by the blow or fall, but, except a knot there, received no other injury. The wife, Mary Petrie, then filed this action under section 4 of the Kentucky Statutes to recover for the death of her husband. The defendant pleaded, in substance, that he was acting in his official capacity; that the deceased committed an offense in his presence by striking Crouch, and immediately turned to flee; that he tried to stop him, and place him under arrest, and pursued him for that purpose, but could not overtake him, and was forced to shoot him to prevent his escaping; that he used no more force than was necessary, and that he believed, and had reasonable grounds to believe, that a felony had been committed; and that he had no other means of preventing the escape of the felon but to shoot him. The court instructed the jury that, if the officer believed in good faith, and had reasonable grounds to believe, that Petrie had committed a felony, and, after using all other available means to arrest him, fired the fatal shot solely in order to procure his arrest, and in doing so used no more force than appeared to him to be reasonably necessary in order to make the arrest, they should find for the defendant. The jury found a verdict for the defendant under these instructions, and the plaintiff appeals.

We think it evident from the proof that Petrie's flight was not to avoid arrest, but only to escape what he conceived to be an impending danger. We think it also clear that the fall of Blye was due rather to his being very drunk than to any other cause, for he seems to have fallen in the scuffle, and not when he was struck. The jury were warranted in concluding from all the evidence that Petrie had in fact committed no felony. The question, therefore, pre-

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sented is, may a peace officer, to make an arrest upon a suspicion of felony, shoot a person who does not stop when called upon to halt? The statute provides: "A peace officer may make an arrest . . . without a warrant when a public offense is committed in his presence, or when he has reasonable grounds for believing that the person arrested has committed a felony." "A private person may make an arrest when he has reasonable grounds for believing that the person arrested has committed a felony." "No unnecessary force or violence shall be used in making the arrest." Cr. Code Prac., sections 36, 37, 43. In *Dilger v. Com.*, 88 Ky., 560 (11 R., 67), 11 S. W., 651, the court, after referring to these statutory provisions, speaking of the officer's authority, said: "Our statute is silent, save as above cited, as to the force he may use. We must, therefore, turn to the common law for guidance. By it, in a case of felony, he may use such force as is necessary to capture the felon, even to killing him when in flight. Where it is a misdemeanor, however, the rule is otherwise. It is his duty to make the arrest, but, unless the offender is resisting to such an extent as to place the officer in danger of loss of life or great bodily harm, the latter can not kill him. He can only do so, or inflict great bodily harm, when, by reason of the resistance, he is placed in the like danger. If he meet with resistance, he may oppose sufficient force to overcome it, even to the taking of life." In the previous case of *Head v. Martin*, 85 Ky., 481 (9 R., 45) 3 S. W., 622, the court announced the same rule. There it is also said: "Human life is too sacred to admit of a more severe rule. Officers of the law are properly clothed with its sanctity. They represent its majesty, and must be properly protected. But to permit the life of one charged with a mere misdemeanor to be taken when fleeing from the

officer would, aside from its inhumanity, be productive of more abuse than good. The law need not go unenforced. The officer can summon his posse, and take the offender." The authorities are clear that where the offense is only a misdemeanor the officer can not, to prevent his escape, take the life of the offender when in flight. *Head v. Martin*, 21 Am. & Eng. Ency. Law, 204; *Thomas v. Kinkead*, (Ark.), 18 S. W., 554, 15 L. R. A., 558, 29 Am. St. Rep., 68; note to *Hawkins v. Com.*, 61 Am. Dec., 162. They are also uniform that an officer may lawfully arrest one who, as he believes, and has reasonable grounds to believe, has committed a felony. *Doering v. State*, 19 Am. Rep., 669. And it is laid down that in such case he must proceed very cautiously where the person sought to be arrested flees, as flight is different from resistance. Note to *Hawkins v. Com.*, 61 Am. Dec., 162. But these authorities do not determine the question whether an officer acting without warrant is excusable for killing such a person in flight when he had reasonable grounds to believe a felony had been committed, although in fact the offense was only a misdemeanor. The common-law rule as to the arrest of a felon is thus stated in 2 Bish. Cr. Law, section 647: "And in cases of felony the killing is justifiable because an actual arrest is made, if in no other way the escaping felon can be taken." See, also 4 Bl. Comm., 292. In *Conraddy v. People*, 5 Parker, 234, an officer, who had arrested a person on suspicion of felony, shot and killed him when he attempted to escape. The deceased was in fact guilty of only a misdemeanor, and the officer was held guilty of manslaughter. To the same effect, substantially, is the case of *People v. Kilvington*, 104 Cal., 86, 37 Pac., 799, 43 Am. St. Rep., 73. There an officer saw two men running, the hinder man crying out, "Stop, thief!" He commanded the

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front man to stop. The order was disobeyed. He then shot and killed him. It was held that, as he had reasonable cause to believe a felony had been committed, and shot merely to intimidate the man sought to be arrested, and not with the purpose of hitting him, it was a question for the jury whether he was guilty of criminal negligence.

[We have been unable to find any common-law authority justifying an officer in killing a person sought to be arrested, who fled from him, where the officer acted upon suspicion, and no felony had in fact been committed. The common-law rule allowing an officer to kill a felon in order to arrest him rests upon the idea that felons ought not to be at large, and that the life of a felon has been forfeited; for felonies at common law were punishable with death. But where no felony has been committed the reason of the rule does not apply, and it seems to us that the sacredness of human life and the danger of abuse do not permit an extension of the common-law rule to cases of suspected felonies. To do so would be to bring many cases of misdemeanor within the rule, for in a large per cent. of these cases the officer could show that he had reasons to suspect the commission of a felony, and it would be left entirely with him to say whether he was proceeding against the defendant for a misdemeanor or for a felony. The notion that a peace officer may in all cases shoot one who flees from him when about to be arrested is unfounded. Officers have no such power, except in cases of felony, and there as a last resort, after all other means have failed. It is never allowed where the offense is only a misdemeanor, and where there is only a suspicion of felony the officer is not warranted in treating the fugitive as a felon. If he does this, he does so at his peril, and is liable if it turns out that he is mistaken. He may lawfully arrest upon

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a suspicion of felony, but he is only warranted in using such force in making the arrest as is allowable in other cases not felonious, unless the offense was in fact a felony.] "In all cases, whether civil or criminal, where persons having authority to arrest or imprison, and using the proper means for that purpose, are resisted in so doing, they may repel force with force, and need not give back; and, if the party making resistance is unavoidably killed in the struggle, this homicide is justifiable." 1 Russ. Crimes, 665. In *Lindale v. Com.* (111 Ky., 866) (23 R., 1307) 64 S. W., 986, this rule was followed where an officer attempted to arrest a person upon reasonable grounds to believe he had committed a felony, and was forcibly resisted by him. But where a supposed offender simply fails to stop when ordered to do so, a different principle applies. Although the rule is otherwise laid down in *State v. Evans*, 161 Mo., 95, 61 S. W., 590, 84 Am. St. Rep., 669, the question was not before the court in that case; and, as was well said in *Thomas v. Kinkead* (Ark.) 18 S. W., 854, 15 L. R. A., 558, 29 Am. St. Rep., 70, the rule as thus stated is not sustained by the common-law authorities.

The court should have allowed the evidence as to what took place between Blye and Crouch and the two women; also as to what took place between them and Joe Petrie; as they were only a short distance from home when the transaction occurred, and before they got home they heard the shots. The whole thing was so closely connected that it should all be regarded as one transaction, and the evidence referred to was competent as *res gestae*.

Judgment reversed, and cause remanded for a new trial.

CASE 16—ELECTION CONTESTS—WILKINS AGAINST DUFFY FOR COUNTY JUDGE AND GILL AGAINST MALLORY FOR COUNTY ATTORNEY.—NOVEMBER 12.

Wilkins v. Duffy.
Gill v. Mallory.

114	111
1124	726
114	111
125	775

APPEALS FROM TODD CIRCUIT COURT.

PETITIONS DISMISSED AND CONTESTANTS APPEAL. AFFIRMED.

ELECTION—NOMINATIONS—PETITIONS—PLACING NAMES ON BALLOTS.

- Held: 1. Designating one in a petition of nomination as the "Republican candidate," instead of the "candidate of the Republican party," does not affect its sufficiency.
2. Though a party nomination by petition is allowable only in case of failure to nominate by convention or primary, the name of the person nominated by a petition, not stating there was no other nomination, should be put on the ballot of that party by the clerk; he knowing that there was no other nomination by the party for the office, and that no one claimed it.
3. A petition of nomination for a party is not insufficient because not stating that petitioners are members of the party; the statute only requiring that it be stated that they are qualified, and desire to vote for him for the office.
4. Failure of the clerk to place the names of candidates on the ballot under the title and device of the Republican party, as they were entitled to have them placed, and placing them under the title of the Independent Republican party, though clearly affecting the result of the election, will not vitiate it; it being claimed that the action of the clerk was in reliance on the opinion of the attorney general in the interpretation of an opinion, susceptible of the misconstruction put on it, which would indicate that the clerk did not act from a corrupt or fraudulent motive, and he being entitled to the presumption that he acted honestly; and Laws Ex. Sess. 1900, c. 5, section 12, authorizing an election to be declared void only where it appears that there was "fraud, intimidation, bribery or violence" in the conduct of the election.

Wilkins v. Duffy. Gill v. Mallory.

J. D. STANDARD AND B. B. PETRIE, FOR APPELLANTS

We maintain:

1. That the failure of the clerk to give appellants the benefit of their party title and device to which they were unquestionably entitled was to deny him the right guaranteed by the Constitution of a free and equal election.

2. Even had the petitions of nomination been defective, the clerk having received and filed them without question, and having, after ample time for deliberation promised them before the time for filing petitions had expired, that he would place their names on the ballots as requested, his failure to do so was such fraud upon their rights as would necessarily vitiate the election.

3. After the clerk determined that he would not place the names of appellants under their party title and device, he should at once have informed them of this fact and given them an opportunity either to test their rights in the courts or to select a device for themselves.

It was contended, and was so held by the lower court, that in order to nullify and render void the election, it must not only be shown that there was fraud, such as would prevent a fair election, but further that the appellees participated therein.

Conceding this to be true, we are at a loss to see how the court could hold that the appellee, Mallory, was not connected with the fraud, when the evidence shows that he was, all along, the counsellor and advisor of the clerk and influenced him in committing the frauds which he did. Whilst the conduct of the clerk is inexcusable, it is certainly more excusable than the advice and counsel of appellee, Mallory, who was one of the direct beneficiaries of the fraud.

Our view of the cause is that the statute, and the ruling of the courts thereunder, do not attempt to establish the doctrine that a candidate must be a party to the fraud in order to have the election declared void.

AUTHORITIES CITED.

Southall v. Griffith, 18 Ky. Law Rep., 1134; Constitution of Ky., Bill of Rights, sec. 6; Hocker v. Pendleton, 19 Ky. Law Rep., 135; Hollon v. Center, 19 Ky. Law Rep., 1134.

PERKINS & TRIMBLE AND J. H. HAZELRIGG, FOR APPELLEES.

It is not contended that either of these two contestants received a majority of the votes cast for the office for which he was a candidate, but it is alleged that the county clerk im-

Wilkins v. Duffy. Gill v. Mallory.

properly arranged the official ballot, and fraudulently placed the names of certain candidates upon the ballot in such a manner as to confuse and mislead the voters and in this way there was no valid election.

All of these averments being denied, we submit that the proof fails to sustain them.

The fact, if it is a fact, that the clerk said that he intended to put contestants' names under the party device does not render him liable to the charge of fraud. He, being no lawyer, may have so intended, and may have thought it was his duty to do so, before being advised to the contrary by the attorney general.

Our contention is that the clerk could not legally place the names of all the Republican candidates under the party device under the manner in which they were nominated. This question has been settled by this court in the case of *Creech v. Davis, &c.*, 21 Rep., 325.

It can not be seriously contended that appellants' petitions of nomination, came up to the requirement of the statutes. The petitioners do not claim to be Republicans, and do not show that there has been no Republican convention. The clerk has therefore failed in no duty in not putting appellant's names under the log cabin.

But if the clerk acted ignorantly or fraudulently, he alone must suffer. The attempt to connect appellee Mallory with any fraud is a complete failure, and there is no semblance of proof connecting appellee Duffy with any wrong doing.

AUTHORITIES CITED.

Southall v. Griffith, 18 R., 599; *Hollon v. Canter*, 19 R., 1134; *Creech v. Davis, &c.*, 21 R., 325; *Kentucky Statutes*, secs. 1455, 1456.

OPINION OF THE COURT BY JUDGE O'REAR—AFFIRMING.

These two appeals are election contests. They involve the same facts, and are dependent upon substantially the same evidence. They are consequently considered together. In the first case, *Wilkins v. Duffy*, the parties were candidates for the office of county judge of Todd county, voted for November 5, 1901. In the second case, *Gill v. Mallory*, the parties were candidates for the office of county attorney;

of Todd county at the November, 1901, election. The appellees were the nominees of the Democratic party for the offices above named, respectively. The offices filled by that election were: Member of the General Assembly, county judge, county attorney, sheriff, jailer, superintendent of common schools, assessor, coroner, surveyor and justices of the peace and constables. There was a full ticket nominated by the Democratic party for those offices at this election. While some dissatisfaction is shown to have existed against some of the Democratic nominees, within their party, it is not claimed that those placed upon the ballot, including appellees in these cases, were not entitled to be so placed as the regular nominees of their party. The Republican party attempted to make nominations of candidates for some or all of these offices. The method adopted was by a delegate convention. After several adjournments, this convention nominated a full ticket, excepting county attorney. One Ben Miller was chairman of the convention. After its adjournment he declined and failed to certify any of the nominations. The cause assigned was that he first required each nominee to pledge himself that he would continue a candidate until the close of the election. There seems to have been some division of sentiment among the members of the Republican party as to whether nominations should have been made for the offices of sheriff and jailer. The convention first tendered the nominations for county judge and county attorney to appellants, respectively. They then declined them. After the final adjournment of the convention and after Miller had refused to certify the nominations, the chairman and secretary of the Republican county executive committee executed certificates of the nominations, and filed them with the county clerk. Several of the candidates, however, re-

signed their nominations. The candidate for county judge, sheriff and representatives were among the number. Thereupon petitions were filed before the county court clerk of the county, on August 12, 1901, signed by more than 100 names, with postoffice addresses and places of residence given, nominating candidates for these vacancies on the Republican ticket, and for the vacant place on the ticket for county attorney; appellants Wilkins (for county judge) and Gill (for county attorney) being so named.

The petitions were all of the same form, the following being one of them: "We, the undersigned, citizens of Todd county, Ky., whose postoffice addresses and residences are set opposite each of our names, hereby request and petition you to cause to be printed on the ballots to be used in the election of county officers for Todd county on the 5th day of November, 1901, in the list of names of the Republican candidates for said offices, the name of Walker Wilkins as the Republican candidate for the office of county judge of said county. Said Walker Wilkins resides near Elkton, Ky., in election precinct No. 3 in Todd county, Ky., and is a member of the Republican party, and is legally qualified to hold the office of county judge of said county. We, whose names are subscribed hereto, are legally qualified to vote for said Walker Wilkins for said office. You are requested to cause his name to be printed upon the ballot aforesaid under the title of 'Republican Party,' and under its device, to-wit, the log cabin."

A rumor reached appellants that the county court clerk, who was a candidate and the Democratic nominee for reelection at that election, would not place the names of appellants and others similarly nominated on the ballot under the name and device of the Republican party. Their representatives had several conferences with the clerk, trying

to learn his purposes in that respect, and with the view, also, of taking compulsory process against him to so print the ballots if he had declined. Out of further precaution, as appellants claim, they again filed with the clerk petitions in the exact language of those theretofore filed, one of which is quoted above, and signed each by more than 100 names, with postoffice addresses, etc. These last petitions were filed on October 21, 1901, the last day, under the law, for filing petitions or certificates for nominations for the ensuing November election. They did not include any of those previously signing. On that day the clerk assured them, through their representatives and attorneys, that, unless he was prevented by injunction or "by law," he would cause the names of Wilkins, Gill and the others of the Republican candidates, to be printed on the official ballots under the title "Republican Party," and its device, the log cabin; that, if he was so prevented, he would give them timely notice. Instead of having the ballots printed as stated, they were printed thus: The names of all the nominees of the Democratic party were printed in one column, under the title "Democratic Party," and device, the rooster. The Republican candidates for clerk of the county court, jailer, assessor, superintendent of schools, surveyor, and coroner, and two candidates for justice of the peace, were placed under the title "Republican Party," and the device of log cabin. For the offices of representative, county judge, county attorney, sheriff, and three of the candidates for justice, the Republican candidates' names were printed in a separate column, headed "Independent Republican Party," and under a device of a pick and shovel. Corresponding places under the regular Republican ticket were not filled on the ballot as prepared. The form of the ballot is not shown to have been known to any person in

the county prior to the morning of the day of the election, except to the clerk of the county court, W. A. Dickinson, and to appellee Mallory. No other person was claiming to be entitled to the places on the ticket as Republican candidates for these offices. There was no contest, settled or unsettled, on that account. It is claimed by appellants that they and their adherents and "workers" were completely surprised, and their discipline demoralized, by the form of the ballot; that their partisans and friends had all been instructed that their names would appear under the name and device of the Republican party, and that, to vote for them, the ballot should be marked within the circle under the log cabin; that many of their supporters could not read, and were therefore unable to find their names on the ballot, so as to cross over and vote for it; that many of them were ignorant as to the manner of voting "crossed" or "mixed" tickets, and many of them left the voting places without voting because of this confusion, and in consequence many votes were lost to appellants and to the whole of the Republican ticket by this misarrangement of the ballot.

Other facts pertinent to the statement will be set out hereinafter, as specially bearing on particular points decided.

The circuit court dismissed the petition of appellants, thereby adjudging the election to have been valid, and appellees to have been elected to their respective offices. The questions of law presented by these appeals are the following: (1) Were the names of appellees entitled, upon the facts stated, to go upon the official ballot under the title and device of the Republican party? (2) If they were, what effect upon the election had the action of the clerk in placing the names as was done?

The right to participate in selecting the officials who directly administer government is conferred by the Constitution upon the male citizens of the State, over 21 years of age, who have not been convicted of certain high crimes, and who are free from certain disabilities enumerated in the Constitution and statutes. But the manner of exercising this right, except that it shall be by secret ballot and at certain stated times, is regulated by statute. Thus the hours within which the election shall be held, the officers conducting same, and the manner of preparation of the ballot and of canvassing and certifying the result, are all regulated by statute. The election must be by ballot. The ballot is required by the law to be prepared and furnished by certain officials. In order that the election may be free and equal, as guaranteed by the Constitution, and as is essential to the very life of a republican government, every reasonable opportunity is afforded to the elector to vote for the persons of his choice, free from the intermeddling or coercion of any official or other person. From the earliest times, one or more men in every community have aspired to rule the others. Over-persuasion, force, fraud and bribery are the most familiar improper means adopted to accomplish this end. To prevent and circumvent these, the ballot has been adopted as the method of voting; and in nearly all the States, as well as in many other countries where the elective system prevails, the Australian ballot is in use; that is, a ballot which must be furnished and prepared by public authority, must be so arranged as to be readily adaptable to the end that it may certainly and simply express the voters' will, and must be marked secretly by the voter. In no other way now can the citizen exercise this high privilege and duty in choosing the public officials. Consequently it is of paramount import-

ance that the officer charged by law with the preparation of this ballot should have neither right nor power to deprive the elector of his privileges. The Legislature, with this point in view, has clearly defined by statute how and by whom the ballot is to be arranged. The sections of the statute bearing on this subject recognize the fact of party affiliation, and the further fact that, to a large extent, political government is determined by party authority and policies. Therefore it is enacted that the ballot shall be arranged by giving preference to party nominations. But space must be so left on the ballot that each voter may not only choose between the nominated candidates, but may vote for any person whomsoever instead. Nominated candidates, however, are regarded as being, and in fact generally are, the ones from among whom the official is chosen. With much circumspection the statute provides how nominations may be made. First place is given to party nominations, when done under the official authority of the party, by any party casting at the last preceding general election as much as 2 per cent. of the total vote. The nominees so selected may be certified to the clerk of the county court, the official charged by law with the preparation of the ballot, by the governing party authority. If it be by primary election, the certificate of nomination to be signed and duly acknowledged by the chairman and secretary of the party making the nomination within the territory voting for the office; if by convention, then to be certified either by the chairman and secretary of the convention, or by the chairman and secretary of the county, if a county office, or of the State, if a State office. Further provision is made that, if any nominee resigns or dies, the vacancy is to be filled upon the certificate of the governing party authority of his party within the district affect-

ed, or by convention, primary election, or petition. If two or more should claim the right of a party nomination, the one recognized by the governing authorities of that party shall be given the place on the ballot reserved for the nominees of that party. If the party fail to make a nomination by primary election or convention, then it is provided: "If any political party entitled to nominate by convention shall in any case fail to do so, the names of all nominees by petition for any office who shall be designated in their petition as members of, and candidates of, such party, shall be printed under the device and title on the ballots as if nominated by a convention."

In the cases at bar the Republican party was admittedly entitled to nominate candidates for the offices in contest. It did nominate a candidate for the office of county judge by convention. His subsequent resignation of the nomination left a vacancy on the ticket of that party for that office, as if no nomination had been made. It then was permitted to that party to make a nomination for the office in one of several ways, as follows: (1) By primary election; (2) by convention; (3) by petition; (4) in this state of case, by certificate of the chairman of the county committee of that party. See section 1, c. 3, Acts Ex. Sess., 1900. The party in this instance chose to adopt the method of making the nomination by petition. The question, then, is, was that petition sufficient, in conforming to the requirements of the statute, so as to entitle the nominee so named to be placed on the ballot as the candidate of the Republican party? We must look to the statute for answer to this question, for it must be our guide. The section just cited is the one containing the law on this subject. So far as it affects the case in hand, it is, in addition to what has just been quoted, as follows: "The county clerk of each

county shall cause to be printed on the respective ballots the names of the candidates nominated by the convention or primary election of any party that cast two per cent. of the total vote of the State at the last preceding general election, as certified to the said clerk," etc., "and also the name of any candidate for any office, when petitioned to do so by electors qualified to vote for such candidates, as follows: . . . For a county officer or member of the General Assembly, one hundred petitioners. . . . The signatures of such petition need not be appended to one paper, but no petitioner shall be counted except his residence and postoffice address be designated. Such petition shall state the name and residence of each of such candidates; that he is legally qualified to hold such office; that the subscribers desire, and are legally qualified, to vote for such candidate; and shall designate a brief name or title of the party or principle which said candidates represent, together with any simple figure or device by which they shall be designated on the ballot." Do the petitions in this case meet these requirements? As stated, each petitioner signing the papers stated thereon his postoffice address and residence. The petitions stated the name of the candidate; the office for which he was nominated; that he was legally qualified to hold such office; that the subscribers desired to, and were legally qualified to, vote for such candidate; and they stated that the person nominated was a member of the Republican party; that he was nominated as the Republican candidate for the office of county judge, in one case, and county attorney, in the other, adding: "You are requested to cause his name to be printed upon the ballot aforesaid, under the title of 'Republican Party,' and under its device, to-wit, the log cabin." The petitions seem to be strictly a literal compliance with the terms of

the statute. We will take up and notice the reasons why appellees urge that the petitions were not sufficient:

First, it is argued that the nominee was designated as the "Republican candidate," instead of as the "candidate of the Republican party." Of course, it is not argued that the difference misled the clerk or any one else. But it is said there may be any number of Republican candidates, for every Republican who might be a candidate would be a "Republican candidate," whereas there could be "only one candidate of the Republican party." In our opinion, the phrases "the Republican candidate," and "the candidate of the Republican party" are synonymous terms, and are so universally employed and understood. That they were intended to be and were so understood in this case can not be doubted. Even if the grammatical construction of the sentence was incorrect, it would no more invalidate the petitions than if words therein were misspelled, provided the true intent could be gathered from it, and it substantially complied with the requirements of the statute.

The next objection is that the petitions do not state that the Republican party had failed to make a nomination by convention or primary, and, unless there was such a failure, a party nomination by petition was not allowed. Waiving for the moment the clerk's personal knowledge on this subject, the records of his office then disclosed to him officially that the Republican party had, by convention, made nominations for all county offices except county attorney; that for the office of county judge the nominee had that day resigned his nomination, and thereby there was a vacancy to be filled by petition or otherwise, as allowed by law. Furthermore, nothing in the statute regulated the time of filing the respective petitions or certificates of nomination, further than that they should not be filed for more than

sixty nor less than fifteen days before the election. If a party nomination by petition was filed sixty days before the election, notwithstanding it stated and it was the fact that the party had not, by convention or primary election, nominated a candidate for that office, such filing of the petition could not prevent the party's making the nomination by convention or primary up to within fifteen days before the election. When the clerk came to make up the ballot, after the time for certifying nominations was closed, if there was only one nomination of a party, and that was by petition, for a given office, the fact that no certificates of nomination were filed was sufficient to warrant him in placing on the ballot as the party nominee the person nominated by petition. But in this case it was conclusively shown that the clerk knew, as a matter of fact, that the Republican party had made no other nomination for these offices, save as shown by the files of the clerk's office. He knew that the convention nominated a candidate for county judge; that he had resigned his nomination; that appellant Wilkins was then nominated by petition, and appellant Gill was likewise nominated for county attorney, and they were regarded and treated as the nominees of that party for those offices; that no one else was contesting the nominations, or claiming to have been nominated by the Republican party in any manner for either of these offices. It is claimed that the clerk was authorized, by a technical, close construction of the statute, to disregard these petitions, because of the unimportant informalities supposed to exist and already noted. Concerning the regularity of nomination petitions, the supreme court of New York, in *re Adams*, 21 Misc. Rep. 396, 47 N. Y. Supp. 543, per Herrick, J., said: "The courts should not be astute to discover, or overwilling to accept the discovery by others of, technical defects

upon which such certificates of nomination can be declared null and void and set aside, but should hold that when the spirit and substance of the laws have been observed, that is sufficient." This court has had occasion to review the act of a clerk who refused to place the names of certain candidates on the ballot because of defects in the certificate of nomination. In the case of *Hollon v. Center*, 102 Ky., 119, 19 R., 1134, 43 S. W., 174, Center and others were claiming to be the nominees of the Democratic party for the various county offices of Wolfe county, claiming their nominations by virtue of the action of a party primary election. The certificates of nomination filed by the chairman and secretary of the county failed to state the residence of either of the nominees, or of the chairman or secretary, nor were they acknowledged. By the statute they were required to be acknowledged before some officer authorized to administer an oath, and the residences of the candidates and certifying officers must be given. The clerk refused to recognize the nominations, or to place the names on the official ballot as the nominees of the Democratic party. It was shown "that it was in the actual and personal knowledge of appellant [the clerk] that appellees had been nominated at the primary election, duly held, as candidates for the several offices mentioned in the various certificates filed with him, and, moreover, that he did not refuse to put their names on the ballots because he was unaware of their regular nomination, but upon the sole ground the certificates did not conform to the formal requirements of the statutes." This court held, in an opinion by Judge Lewis, that as there was no other person claiming the places on that ticket, and as the regular party authorities did not question the nominations purporting to be made for their party, the clerk

should have placed their names on the ballots; and the writ of mandamus to that end was allowed to go.

It is further argued for appellees that the petitions of nomination failed to state that the petitioners were themselves members of the Republican party. It is not claimed that in fact they were not. On the contrary, it is conclusively proven in this record that they were,—at least, that more than the statutory requirement of 100 were. It would seem to be a sufficient answer to this argument to say that the statute does not require the petitioners to state that they are members of the party; it does require them to say that the candidate is a member of the party for which he is being nominated, and that the petitioners are qualified and desire to vote for him for that office. Argument is made that if it were permissible for those not members of a party to nominate a candidate for it by petition, the opponents of a political party may name both tickets. Not so. For a party can by its governing authority easily and effectually prevent this by making nominations by primary election or convention. But even were the danger as suggested, it is a matter of legislative oversight, which the courts are powerless to remedy, however desiring. This objection is based, it is said, upon the decision of this court in *Southall v. Griffith*, 100 Ky., 91 18 R., 399, 37 S. W., 577. As that case is much relied on by appellees, we deem it proper to carefully notice it. In that case Southall brought his action for a writ of mandamus against Griffith, clerk of the county court, to cause to be printed on the ballot Southall's name as a candidate for Congress in the Second district of this State, under the device of the People's party (being a plow and hammer), and under the name or title of that party ticket. The circuit court disallowed the writ, which was affirmed upon appeal. Southall failed to

show affirmatively to the court that he was entitled to go upon the ballot as the nominee of the People's party, for he did not state, nor was it shown, that the People's party had failed to nominate by convention or primary election a candidate for Congress for the Second district, to be voted for at that election; nor did it appear that Southall was himself a member of the People's party, nor that any of his petitioners were. It is a familiar rule of pleading that one applying for the writ of mandamus must show affirmatively the facts entitling him to have it issued, and that his pleadings will be most strongly construed against him. We can not infer that the court intended to add to the statute any requirement not provided by the Legislature. What the court evidently intended to decide, and what we hold that the court in that case did decide, was that if the clerk failed and refused to place upon the ballot the name of one claiming to be the nominee of a party, before a court would interfere to issue its writ of mandamus to compel the clerk to place the name upon the ballot as the nominee of that party all the facts must be shown affirmatively that would entitle the party complaining to the relief sought, and that an absence of such material allegation in the petition filed in the circuit court for the writ of mandamus would be a sufficient reason for withholding the writ. To hold otherwise would be to say that the clerk has a judicial discretion in such matters; that a duty would devolve upon him (at least, the privilege would) to inquire into the party affiliation of each of the signers of the petition, and not only to inquire into them, but to determine them and adjudge them, and not only that, but to inquire into and determine the fact of the signers' places of residence, of their legal qualifications to vote, of the fact of the candidate's qualification to hold the office for which he is attempting

to be nominated, and of the fact of his party affiliation. It would be furthermore to hold that this subordinate executive officer was clothed with judicial functions and jurisdiction, and he might determine these matters within his own mind, settling them within his own bosom, as no provision is made for a record of his conclusions of the particular facts. He can not swear witnesses, nor coerce their attendance. The statute provides no appeal from his decision, if he should be said to be entitled to make such decision. There would be no end of confusion and no limit to the opportunities for fraud and mischief upon the part of this class of officials. Such a jurisdiction is nowhere warranted by either the laws or the spirit of the laws of this Commonwealth. We must conclude that the Legislature never contemplated conferring upon this subordinate executive official such extraordinary power and authority over a matter of such vast moment to the people of the State. His duties are clearly defined by the statute, and are mandatory in their nature. When a petition, with the requisite number of names signed to it, giving the postoffice addresses and residences of the signers, stating in substance so that it may be fairly gathered that the terms of the statute were complied with as to the name and party affiliation of the proposed candidate, the office to which he is nominated, and the party title and device selected by the petitioners, is filed within the statutory time, it then becomes the duty of the clerk to place the name of such candidate upon the official ballot as the nominee of such party, unless there shall be filed within the statutory period of allowance a certificate of nomination for the same office by the same political party, either by convention or primary election, or unless a previous nomination by petition for the same party and same office has been filed, or, in case

of a vacancy by death or resignation or removal, or a previously nominated candidate, by the certificate of nomination by the county chairman of that party.

We are of opinion that appellants were entitled to have had their names printed upon the official ballots for the election to be held in Todd county in November, 1901, as the candidates of the Republican party for the offices, respectively, of county judge and county attorney.

The next inquiry is, What is the effect of the failure of the clerk to place appellants' names on the ballot under the title and device of the Republican party, under the circumstances named? It is not every error, trivial or even serious, that will invalidate an election. Nor, indeed, will the fraud of the officers in charge of the election, or of other persons, necessarily void it. As is well said in McCrary, *Elect.* (4th Ed.), pp. 522, 523, sec. 724: "The weight of authority is clearly in favor of holding the voter, on the one hand, to a strict performance of those things which the law requires of him, and, on the other, of relieving him from the consequence of a failure on the part of election officers to perform their duties according to the letter of the statute, where such failure has not prevented a fair election. The justice of this rule is apparent, and it may be said to be the underlying principle to be applied in determining this question. The requirements of the law upon the elector are in the interest of pure elections, and should be complied with, at least in substance, but to disfranchise the voter because of the mistakes or omissions of election officers would be to put him entirely at the mercy of political manipulators. The performance by the election officers of the duties imposed upon them can be reasonably well secured by providing a penalty for failure so to do." But as said in *re Kneass*, 2 Pars. Eq. Cas., 590: "The true

policy, to maintain and perpetuate the vote by ballot, is found in jealously guarding its purity; in placing no fine-drawn metaphysical obstructions in the way of testing election returns, charged as false and fraudulent; and in insuring to the people, by a jealous, vigilant, and determined investigation of election frauds, that there is a saving spirit in the public tribunals charged with such investigations, ready to do them justice if their suffrages have been tampered with by fraud, or misapprehended through error." It may be stated as the general rule that the misconduct of election officers, or irregularities on their part, will not vitiate an election, unless it appears that the result was thereby affected. 10 Am. & Eng. Enc. Law, 670; McCrary, Elect., 574; Creech v. Davis (21 R., 325), 51 S. W., 423. This general rule is expressly applied in this State by statutory enactment. A part of section 12, c. 5, Laws Ex. Sess., 1900, is as follows: "In case it shall appear from an inspection of the whole record that there has been such fraud, intimidation, bribery or violence in the conduct of the election that neither contestant nor contestee can be adjudged to have been fairly elected, the circuit court, subject to revision by appeal to the court of appeals, may adjudge that there has been no election. In such event the office shall be deemed vacant, with the same legal effect as if the person elected had refused to qualify." It becomes important, in view of the foregoing, to determine whether the action of the county court clerk was fraudulent. It is claimed, as has been stated, that he relied upon the instructions of the then attorney general of the State in the interpretation of Southall v. Griffith, 100 Ky., 91, 18 R., 599, 37 S. W., 577. That the opinion was susceptible of such construction by the clerk seems to be evident enough. This

fact, coupled with the instructions of the attorney general, would seem to indicate that the clerk did not act from a corrupt or fraudulent motive; and therefore, under the statute above quoted, we can not hold that the election was void. But for the opinion above, and the doubts attending its proper construction, the other facts in the record would have been sufficient to have justified a contrary conclusion. However, the official is entitled to the benefit of the presumption that he acted honestly, and with the intent to discharge his duties within the intent of the law. That the omission of the names of appellants from the ballot did affect the result of the election is a matter that seems to be susceptible of reasonably clear demonstration. But this is not enough. It must also be made to appear that the cause of this result was "a fraud, intimidation, bribery or violence in the conduct of the election," in the language of the statute.

Failing to find sufficient evidence of the latter conditions, the judgments of the lower court must be affirmed.

The whole court sitting.

Judge Paynter concurs in the conclusion of the court, but does not agree to all the reasoning of the court.

Chief Justice Guffy's dissenting opinion:

The majority opinion holds that the clerk of the Todd county court should have placed the names of appellants under the Republican party device, to-wit, the log cabin, but also refuses to adjudge the election invalid, or, in other words, to afford any relief to the appellant. It seems to me that the doctrine announced in the opinion places it in the power of each county clerk to defeat any candidate that he desires to defeat, simply by failing or refusing to place his name under the party device of the party that

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nominated him, and thus leave the defeated candidate without remedy. The only remedy it seems possible to give in such a case would be to declare the election invalid, and give the defeated candidates another opportunity to appeal to the people. It is evident from the testimony in this case that the clerk purposely misled the appellants, and induced them to believe that their names would be placed under the log cabin. It is clear to my mind that they ought to have been so placed. The opinion of the court so holds. It is also reasonably certain that if the names of the appellants had been placed under the log cabin, as they should have been, they would have been elected to the offices for which they were candidates. It therefore follows that they were defeated by the illegal and fraudulent acts of the county clerk, who alone had control of the matter. It is of no legal importance whether the successful candidates were a party to or procured this illegal action of the clerk. The injury is the same to the appellants. The court ought to have adjudged the election void, and directed the court below to award a new election. Such a judgment was the only relief that could be afforded, and is the only remedy for such wrongs. Any other rule of construction places the candidates of any party at the mercy of the county clerk. He may defeat any county or district candidate at his will, by failing to place his name under his party device. The question involved herein is of such vast importance to fair elections, to the rights of the people, and to candidates as well, that I felt it my duty to file this respectful but earnest dissent from the majority opinion in this case.

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CASE 17—ATTACHMENT PROCEEDINGS BY POTTER, MATLOCK & CO. AGAINST C. C. SMITH IN WHICH GARNISHEE PROCESS IS SERVED ON L. H. SKILES AND IN WHICH OTHER CREDITORS OF SMITH SET UP CLAIMS.—NOVEMBER 13.

Potter, *et al.* v. Skiles, *et al.*

APPEAL FROM WARREN CIRCUIT COURT.

FROM A JUDGMENT IN FAVOR OF SKILES CERTAIN CREDITORS APPEAL AFFIRMED.

MORTGAGES—EXECUTIONS—JUDICIAL SALES—REDEMPTION—FRAUD—HUSBAND AND WIFE—DOWER—ATTACHMENT.

Held: 1. Land subject to mortgage was sold under execution, and purchased by the execution creditors. Subsequently the mortgage was foreclosed, and a decree was entered for a sale, to pay in order, the mortgage, the execution lien, and other claims held by H. and others. The proceeds of the sale were sufficient to discharge only the mortgage and execution lien, and the mortgagor's equity of redemption was then sold to plaintiff, under Kentucky Statutes, section 1686, providing that, though the equity of redemption may be sold, the debtor still has a right to redeem until the end of the year from the first sale. The debtor being unable to redeem, S. agreed to pay the sum to plaintiff who had exercised his right of redemption, and S. also agreed to pay the debtor's wife a certain amount on her joining in a deed of the land to S., releasing her potential right of dower. Before consummation of this agreement, H. and others had caused executions to issue against the debtor, and on the day that the deed was executed to S., plaintiff brought an attachment suit against the debtor on another debt, and caused garnishee process to be served on S. Afterwards the outstanding executions of H. were levied on the land. **HELD**, that the transaction between the debtor and S. was not a redemption by the debtor, whereby title reverted in him, and became subject to the executions of H., but that the debtor's right to redeem was personal, and not an interest in the land, and the deed to S. was an assignment of this right, and redemption inured to the benefit of S.

2. The transaction between the debtor and S. was not fraudulent.
3. The only right remaining in the debtor's wife was to compen-

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sation for the value of her right of dower in that part of the land not necessary to the payment of the mortgage debt.

4. By the extended opinion by Judge O'Rear granting a rehearing so far as the rights of the debtor's wife, Mrs. Mamie Smith, are concerned, it is held that after the sale of the debtor's land under the original execution and the sale of his equity of redemption therein, and he had conveyed his equity of redemption in both sales to Skiles who was the purchaser thereof at both sales, the purchaser Skiles, desiring to obtain a full title thereto, procured from Mrs. Smith a release of her inchoate right of dower in the proceeds of the sale of the entire tract, after paying the mortgage debt for which it was sold, in which transaction the creditors of the husband have no interest and can not require that the sum paid or contracted to be paid the wife for such release shall be subjected to the payment of their debts, though the sum paid the wife may have been more than the actual value of her dower.

LEWIS MCQUOWN, FOR APPELLANT MAMIE H. SMITH, JOHN B. RHODES, OF COUNSEL.

POINTS AND AUTHORITIES.

1. Neither Potter nor the Warren deposit bank acquired a lien under the execution, or attachment upon the second equity of redemption, because it is not made liable by statute to levy or sale. Section 1686, Kentucky Statutes.

2. The execution in favor of J. H. Smith was prior in time and levy to the execution of Potter and the attachment of the bank. The judgment was sufficient to uphold the execution in favor of Smith. Sec. 368, Civ. Code; secs. 1663 and 1653, Kentucky Statutes; secs. 47 and 51, Freeman on Judgments.

3. The conveyance with warranty by Smith to Skiles invested him with the right to redeem and the redemption, at the time the conveyance was made, passed the title directly to Skiles. *Ewing v. Cook*, 1 Pickle, (Tenn.) 332; *Stoddard v. Forbes*, 13 Iowa, 296, *Watson v. Hannum*, 10 Sm. & M., 521; *Stockett v. Taylor*, 3 Md. Ch., 537; *Harvey v. Spalding*, 16 Iowa, 397; *A. & E. Ency. Law*, vol 20, p. 636, (1st. ed.); *Hepburn v. Kerr*, 9 Hump., 726; *Moody v. Funk*, 82 Iowa, 1; *Beavans v. Dewey*, 82 Iowa, 85; *Gimble v. Ferguson*, 58 Iowa, 44.

4. The second equity can not be subjected either under execution or by bill in chancery. *Ewing v. Cook*, 1 Pickle, 332; secs. 1686 and 2365, Kentucky Statutes.

5. The conveyance by Smith to Skiles was not fraudulent in fact. It could not be fraudulent in law, because the interest

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Smith had in the land could not have been subjected by his creditors. Hence they have no right to complain. Ewing v. Cook, 1 Pickle, 332; secs. 1686 and 2365, Kentucky Statutes.

6. Mrs. Smith was the owner of potential right of dower in the land. She agreed to release it for \$799.00. The court had no power to compel her to part with this right for \$143.00.

7. Even if the contract was fraudulent, Mrs. Smith did not forfeit her right to dower, or power to contract. The contract should have been enforced or set aside, in its entirety, so far as she was concerned.

8. The court had no power in a proceeding, *in invitum*, to fix Mrs. Smith's dower or adjudge how much she should sell it for. This suit was not brought for that purpose.

JOHN M. GALLOWAY, FOR APPELLANT, P. J. POTTER.

POINTS AND CITATIONS.

1. Appellant Potter had an execution lien on the land conveyed to Skiles when Smith recovered it and when he conveyed or passed title to same. See Kentucky Statutes, secs. 1660 and 2362; Million v. Riley, 1st Dana, 359; Whitehead v. Woodruff, 11 Bush, 209; Mahibben v. Arndt, 10 L. R., 847.

2. Skiles does not plead, nor does it appear, that he was a bona fide purchaser without notice or ample means of notice.

Seymour v. McKinistry, 106 N. Y., 230; Frost v. Beckman, 1st Johnson's Chancery, 302; Johnson v. Toulem, 52 Am. Dec., 212, notes; Everet v. Ayers, 65 Id., 315; Devlin on Deeds, secs. 727 to 743; Pomeroy's Equity, secs. 594 to 604, and notes; Williamson v. Brown, 15 N. Y., 354; Nantz v. McPherson, 23 Ky., 597, T. T. B. M., Russell v. Petree, 10 B. Mon., 184; Barnard v. Campan, 29 Mich., 162.

3. The transfer from Smith to Skiles was not for a fair and adequate consideration and was made by vendor with fraudulent intent of which vendee Skiles had notice. Kentucky Statutes, sec. 1903; Summers v. Taylor, 80 Ky., 429; Carter & Co. v. Richardson, 22 L. R., 1209; Lain, &c. v. Morton, &c., 23 L. R., 438; Willis v. Valette, 4 Mt., 189; Notes to State v. Mason, 34 A., State Reports, 399.

4. As to value of potential right of dower, see Lancaster v. Lancaster's Trustee, 78 Ky., 202; Schweitzer v. Wagner, 94 Ky., 458.

5. All the writings which made up the trade between Skiles and Smith one instrument or contract. See Phillips v. So. Div. C. & C. R. R., 22 L. R., 1530.

6. Potter's lien was older and superior to that of the Warren

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Deposit Bank under its attachment. See *Hardin v. Harrington*, II. Bush, 367.

WRIGHT & McELROY, FOR APPELLEE, BANK.

On January 23, 1899, the equity of redemption was sold in this land. The last day to redeem was May 23, 1899.

On May 16, 1899, Potter had an execution issued against C. C. Smith and same was thereafter levied on this 129 acres. On May 20, 1899, Smith and wife sold to Skiles this land, he furnishing the money with which to redeem it, and gave his note for \$799.65, which was attached by the plaintiff bank.

The first issue is with Potter. After Smith's land had been sold, and equity of redemption had been sold, what was left upon which his *f. fa.* could be levied? An execution could only reach the *legal* title to the property. What legal title did Smith have after the legal title and the equity of redemption had both been sold?

We submit that all that Smith had left, if the property was worth more than the debts against it, was an equity—an intangible equity—which might, or might not, be of value. If he failed to redeem, it was worth nothing; if he redeemed or sold when he had the right to do so, he had the surplus. But in *no event* could an execution reach whatever he had, and, therefore, we take it that Potter's *f. fa.* did not and could not create any lien upon the property, and this, too, even if he had had notice given in the county court clerk's office, as required by law, *which he did not do*.

But Mrs. Smith claims that the proceeds of the note should go to her, as against the attachment of the bank. Why? Was it her property? Had it ever been her property? Did she pay anything for it? She and her husband had gotten their homestead. She had signed the mortgage and waived her dower as to the pay debt of about \$2,500. Her potential right of dower in the residue, to-wit., \$143.66, was given her by the court below. The value of her potential right of dower being \$143.66, how can she claim that \$799.65 is required to pay it?

C. C. Smith owed the plaintiff bank a large sum of money. He realized out of an equitable asset \$799.65; he had his homestead and exemption; this justly belonged to his creditors. Suppose the note of Skiles had been made payable to him, and not Mrs. Smith. Would not the court have given it to the bank under its attachment? Because it was made payable to Mrs. Smith, does that alter the rights of the parties?

We respectfully submit that the decree of the lower court

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was correct, and, if any error was committed, it was to the prejudice of the bank and not to either Potter or Mrs. Smith. An affirmance is asked.

SIMS & GRIDER FOR APPELLEE SKILES.

POINTS AND AUTHORITIES.

We claim: (1) That under the arrangement by which Skiles furnished the money and redeemed the property, that C. C. Smith was never beneficially seized after redemption, but only received title as trustee for Skiles and for the purpose of transmitting it to him.

(2) That under the provisions of sec. 2358a, Kentucky Statutes, the appellant, having failed to file in the county court clerk's office notice of his alleged execution lien, can not now assert his lien against Skiles, who purchased without notice of the execution. (As to Skiles having no notice, see deposition of Grider, Record page 118).

Wherefore we respectfully ask that the judgment of the lower court, so far as Skiles is concerned, be affirmed.

AUTHORITIES CITED.

Makibben v. Arndt, 88 Ky., 182; Powers v. Andrews, 84 Ala., 289; Commercial Bldg. Co. v. Parker, 84 Ala., 289; American Freehold Co., &c. v. Sewell, 13 L. R. A., 299.

OPINION OF THE COURT BY JUDGE DURELLE—AFFIRMING.

In 1897 appellee C. C. Smith was the owner of a tract of 147 acres of land in Warren county, upon which he resided with his family, and which was mortgaged to Mrs. Payne for \$2,000. Potter, Matlock & Co., bankers, obtained a judgment against Smith for \$750, the execution for which was levied upon this land, and the land sold by the sheriff, subject to Mrs. Payne's mortgage, the execution plaintiffs becoming the purchasers for \$508. Afterwards Mrs. Payne brought suit to enforce her mortgage lien for \$2,000 and interest, making Potter, Matlock & Co. and other creditors defendants, who set up their execution lien for \$508 and interest. In this proceeding, on motion of Smith, a homestead of 17¾ acres was set apart to him, which was exempt from sale for any of his debts except the debt to

Mrs. Payne. A decree was entered for a sale of the land to pay, first, Mrs. Payne's mortgage debt; next, Potter, Matlock & Co.'s execution lien; next, a debt to Joe H. Smith, a son of C. C. Smith, of \$3,000, secured by a mortgage signed only by C. C. Smith; and, lastly, a claim of P. J. Potter for \$1,415. The 130 acres remaining after setting aside the homestead were sold to J. W. Potter for \$2,990, the amount of the Payne and the Potter, Matlock & Co. claims, which was less than two-thirds of \$6,450, the appraised value of the land. C. C. Smith's equity of redemption was then sold, and purchased by the Warren Deposit Bank for 100, and the bank thereupon redeemed from J. Whit. Potter, the first purchaser. C. C. Smith, therefore still had the statutory right of redemption until the end of a year from the first sale, which expired May 23, 1899. Kentucky Statutes, section 1686. Being unable to raise the money with which to redeem, he arranged with appellee Skiles to pay the bank \$3,392, Skiles agreeing to pay Mrs. Smith \$799 upon her joining her husband in a deed for the land to Skiles; and on May 20, 1899—three days before the expiration of the redemption period—C. C. Smith and wife executed a deed for the land to Skiles. Skiles paid the \$3,392 to the bank, and executed an obligation to pay \$799 to Mrs. Smith as an inducement to her to re-release her potential right of dower, providing in that obligation that, as there were executions in the hands of the sheriff in favor of Joe H. Smith and P. J. Potter, that sum was not to be paid until all cloud upon the title to the land by virtue of such executions and the claim of the Warren Deposit Bank should be removed, and a good and perfect title vested in the obligor. There was a further provision for the deduction of Skiles' costs in any litigation necessary to perfect his title, and for the payment of an attorney's

fee to the counsel of Mrs. Smith. On the same day Joe H. Smith executed a written assignment to Skiles of the lien claimed by him in virtue of his execution against his father in the hands of the sheriff. On May 16th—four days before the execution of the deed—Joe H. Smith had caused to be issued and placed in the sheriff's hands what purported to be an execution for \$3,000 against C. C. Smith.

A few minutes afterwards P. J. Potter placed an execution against C. C. Smith for \$1,445 in the hands of the sheriff for levy. On the same day that the deed was executed the Warren Deposit Bank brought an attachment suit upon a judgment and return of "No property" for \$2,450 against C. C. Smith, and caused garnishee process to be served upon Skiles. Two days later, Joe H. Smith's and P. J. Potter's executions were indorsed by the sheriff as levied on the land May 22, 1899, Potter's levy being subject to Smith's. P. J. Potter, Joe H. Smith, Mrs. Smith, and Skiles became parties to and set up their various claims in the attachment suit of the Warren Deposit Bank against Smith, the judgment in which is now before us for review. Potter claims that the transaction between Smith, Skiles and the bank was a redemption by Smith, whereby Smith reacquired title to the land at a time when Potter's execution was in the sheriff's hands in full force; that he thereby acquired a lien upon the land, and the levy of his execution related back to the time Smith acquired title by his redemption, and that Joe H. Smith's execution was void, for reasons which need not be here considered.

After the sale of the equity of redemption, C. C. Smith had no property in the land which was subject to his debts. He had a personal right to redeem, which might be exercised at any time within one year from the date of the first sale. This right could not be exercised by his cred-

itors. The Legislature made the equity of redemption subject to levy and sale, but in the same section (1686) provided for a second right of redemption, without any provision for subjecting it to the payment of debts. By section 2365, applicable to judicial sales, the right to subject for debt granted by the statute is also limited to the first equity of redemption, as in the case of execution sales. It would seem, therefore, that this provision for the second right of redemption is a provision wholly in the interest of the debtor. In *Bethel v. Smith*, 83 Ky., 87, 7 R., 15, it was held that the right of the creditor to sell the equity of redemption was purely statutory, and therefore must be exercised in strict accordance with, and within the time limited by, the statute. The transaction between C. C. Smith, the bank, and Skiles was not a redemption by Smith from the bank, which vested the title in him, and made it subject to the execution of Potter, followed by a conveyance of his title thus acquired to Skiles. It was one transaction, whereby Smith assigned his interest by his deed with covenant of warranty to Skiles, and Skiles redeemed the property for himself. In *Harvie v. Spaulding*, 16 Iowa, 397, 85 Am. Dec., 526, in an opinion by Judge Dillon, it was said, in construing a similar statute, that: "The judgment debtor, certainly where, as in the case at bar, he has conveyed with covenants, may, as such debtor, redeem. His grantee, by virtue of his conveyance, has such an interest in the property as would also entitle him to redeem." In the present case there was but one transaction. No beneficial interest vested in Smith to which the execution could attach. It was a redemption by Skiles, who paid the money to the bank officer, and it inured to his benefit. Nor was there any fraud in this transaction, in so far as it was a

redemption for the benefit of Skiles by the payment to the bank of the money furnished by him. The right was personal to Smith. He had the right to lose it by limitation, to exercise it himself, or to transfer it to a third person. In our opinion, he either exercised it for the benefit of Skiles, or transferred it to Skiles, and Skiles exercised it.

It becomes unnecessary, therefore, to inquire into the question of priority between the executions of Joe H. Smith and Potter, or whether Skiles knew or did not know of the existence of the Potter execution. He had the right to purchase Smith's right of redemption, and take a deed from him, when the land was redeemed. In this transaction he obtained no estate that either execution could reach. Nor was there any lien upon what he obtained.

But the obligation to Mrs. Smith presents a different question. She had no dower in the land, so far as the Payne mortgage debt was concerned. She had released her dower right as to that. What remained to her was the right of compensation for her potential right of dower in the proceeds above what was necessary to pay that debt. She could not prevent the sale of the land, free from her dower, in the suit to enforce the mortgage; and it was in fact so sold. The utmost to which she could be entitled was compensation for the value of her right of dower in that part of the land not necessary to the payment of that debt, though the proceeds of that part of the land were obtained by a sale of the husband's personal right of redemption. The learned special judge below took the view that the transfer of the right of redemption was the consideration for the obligation given to Mrs. Smith, and that that obligation was in reality for Smith's benefit, and, in consequence, was subject to the attachment for Smith's debt. Upon the record before us we are not able to reach

a different conclusion. There was, therefore, no error to the prejudice of Mrs. Smith, and the judgment is affirmed.

Extended opinion by Judge O'Rear granting petition for rehearing as to the interest of Mrs. Mamie Smith, appellant:

The opinion delivered herein November 13, 1902, in so far as it treats of the rights of Mrs. Mamie Smith, the wife of the debtor whose property was involved in this litigation, is withdrawn. A rehearing is granted to her. It will be borne in mind that the land of her husband had been sold under execution. Failing to bring two-thirds of its appraised value at such sale, his equity of redemption was also sold under execution. This sale was expressly authorized by statute. The same statute also gives to such debtor the right to redeem from both sales within a year from the date of the first sale. See sections 1684-1686, Kentucky Statutes. The executions under which this land was sold were against the husband alone. Any sale and conveyance of the land passed the title of the husband, necessarily subject to the inchoate right of dower of the wife therein. Although a part of the land was taken to satisfy a mortgage in which she had joined, relinquishing her dower so far as the mortgage debt was concerned, yet as to the residue of the land, and as to the proceeds of the sale of such residue, where the whole tract was sold under these proceedings, she continued to have her inchoate right of dower. Section 2135, Kentucky Statutes, is: "The wife shall not be endowed of land sold, but not conveyed by the husband before marriage, nor of land sold, in good faith, after marriage, to satisfy a lien or encumbrance created before marriage or created by deed in which she had joined, or to satisfy a lien for the purchase money; but if there is a surplus of the land or proceeds of sale after satisfying

the lien, she may have dower out of such surplus of the land or compensation out of such surplus of the proceeds, unless they were received or disposed of by the husband in his life time." The wife's claim, therefore, was a valid one, and valuable, although it was dependent necessarily upon her outliving her husband. The purchaser, Skiles, desired a title free of the incumbrance of her claim. He contracted with her to pay her \$799 for it. She refused to join in the deed conveying her potential dower unless she was first satisfied. The purchaser and she agreed that he would pay her \$799 for her interest. Whether this was excessive is not material in this case. Skiles, the purchaser, is not complaining that he has paid too much. He is not seeking to avoid his contract for any reason. Mrs. Mamie Smith is insisting upon it. We can not see why these persons, competent under the law to make a contract, may not make such one as this. Nor can we see wherein the creditors of the debtor, Smith, are affected by it. The original opinion holds that Smith's right of redemption of the last sale—the one to the bank—was not subject to sale under the execution of his creditors; that his right of redemption of his interest sold was a personal one, which he could exercise or not; and that his failure to exercise it was not a subject of complaint at law by his creditors. If he had failed to exercise it, the interest of his wife, by reason of her inchoate dower, would not have been less than it was after he had exercised it. His action or non-action could not affect its value. Therefore the mere fact that the purchaser of the land, who redeemed it under Smith's assignment of his right, paid Mrs. Smith more for her dower than the court might believe the dower was worth, can not affect her right to receive and retain the agreed price. Of course, if it had been made to appear that Smith had

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conveyed his property, which otherwise would have been subject to his creditors, to a vendee, who paid the consideration to the debtor's wife nominally as dower, but as a matter of fact for the debtor's interest, the arrangement would be a fraud, and the subterfuge would not be allowed to stay the court's remedial process. But we can not find that such was the case here.

The judgment, in so far as it subjects any sum agreed to be paid to Mrs. Mamie Smith for her dower by Skiles to the creditors of C. C. Smith, is reversed, and the cause is remanded, with direction to judge the whole of that sum to Mrs. Smith.

Judge Settle not sitting.

CASE 18—PROCEEDING BY O. H. BARTLETT AND OTHERS TO BE EXONERATED FROM PAYMENT OF POLL TAX.—NOVEMBER 14.

Short, Sheriff v. Bartlett, et al.

APPEAL FROM DAVIESS CIRCUIT COURT.

FROM A JUDGMENT OF THE CIRCUIT COURT REVERSING A JUDGMENT OF THE COUNTY COURT REFUSING THE RELIEF SOUGHT, W. J. SHORT, SHERIFF, APPEALS. REVERSED.

COUNTIES—TOWNS—POLL TAXES—RIGHT TO LEVY.

- Held: 1. Constitution, secs 180, which provides that "the General Assembly may authorize the counties, cities or towns to levy a poll tax not exceeding \$1.50 per head," does not by reason of the disjunctive "or" preclude the levy of the tax by both a county and a town; the purpose of the section being to limit the levy in either county, city or town to \$1.50 per head.
2. Under the Constitution and enactments of the Legislature, a county, through its fiscal court, can levy an *ad valorem* tax within the constitutional limitations, on all property in the county, for county purposes outside or inside cities and towns, and in the same way may levy a poll tax for county purposes upon citizens both inside and outside of cities and towns located therein.

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LA VEGA CLEMENTS, ATTORNEY FOR APPELLANTS.

The appellees contended in the lower court that under section 180 of the Constitution, they were exempt from paying a poll tax to the county because they paid a like tax to the town of Whitesville which is located in said county, which section is as follows: "The General Assembly may authorize the counties, cities or towns to levy a poll tax not exceeding \$1.50 per head."

That said section by the use of the disjunctive word "or," restricts the levy to either the county, city or town, and prohibits more than one levy.

If this contention should prevail, then it would be a race every year between the county and every incorporated town thereof, as to which should make the first levy, thus barring the other from collecting the double tax.

Clearly, the only limitation in said section 180 is, that the Legislature can not authorize the levy of a poll tax in any county, city or town *exceeding one dollar and fifty cents per head*, the limitation being as to the amount only.

The fact that cities and towns are separated from the county for governmental purposes does not exempt the inhabitants thereof from liability for their proportion of the necessary expenses of the county.

AUTHORITIES CITED.

Constitution, sec. 180; Kentucky Statutes, secs. 1839, 1851, 2744; Wolf v. McHargue, 88 Ky., 251.

J. R. HAYS, ATTORNEY FOR APPELLEES.

The case of Wolf v. McHargue, 88 Ky., 251, relied on by counsel for appellant, is not in point. That case was decided under the former Constitution, which, as heretofore stated, contained no restriction, of any kind, on taxation, and is in reference to property tax and not poll tax. I earnestly insist on a careful consideration of this question. While the town of Whitesville is of inconsiderable size, the question involved concerns each municipality in this State, except perhaps, cities of the first class, and I confidently ask an affirmance of the judgment.

SYNOPSIS.

1. The Constitution prescribes the limit of taxation and the authority of the Legislature in reference thereto. (Con., secs. 157, 158.)

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2. But one poll tax can be levied on any citizen. (Con., secs. 180-181.)

3. The charters of the various classes of cities and towns constitute one enactment. (Con., secs. 156 to 168 inclusive, Kentucky Statutes, secs. 2980, 3174, 3290, 3490, 3673, 3704; Black on Interpretation of Laws, p. 206; U. S. v. Freeman, 44 U. S., 33; 3 How., 556; Ferguson v. Monroe county, Supers., 71 Miss., 524; Louisville v. Com., 9 Dana, 70; State, etc., v. Clark, 54 Mo., 216; Roff v. Johnson, 40 Ga., 555; Linton's Appeal, 104 Pa., 228; Perkins v. Perkins, 62 Barb., 531; United Soc. v. Eagle Bank, 7 Conn., 456; Black, Interpretation of Laws, sec. 86; State v. Gerhardt, 145 Ind., 439; 33 L. R. A., 322.)

4. A fiscal court has no authority to levy and collect a poll tax off of citizens of an incorporated town or city. (Kentucky Statutes, sec. 1851.) Section 2744, Kentucky Statutes, although occurring only in charter of first class cities, is applicable to charters of all cities and towns.

5. The charter of a city, or incorporated town, necessarily, separates it from the remainder of the county for governmental purposes.

6. An incorporated town is a higher grade of local government than a county (Dillon Mun. Corp. (Sec. Ed.) pp. 49, 96, 96 and note), and has greater liabilities and responsibilities than a county, and when only one of two bodies can exercise a given authority, that occupying the higher grade, and having the greater responsibility is entitled to precedence. (Lexington v. Thompson, 67 S. W., 480; Cooley on Taxation, Sec. Ed., pp. 679, 680 and note.)

7. Towns of the sixth class can not meet their liabilities unless permitted to levy and collect poll tax, and a liability can not be created and the power to liquidate it denied. (Cooley on Taxation, Sec. Ed., pp. 72, 329, 427.)

8. The charters of sixth class towns as well as all cities in Kentucky, are subsequent to the act creating fiscal courts, and where two acts are inconsistent the later prevails. (Cooley on Con. Lim., 72, note.)

9th. The fiscal court of Daviess county has by the construction of two statutes, one similar and the other a kindred statute acquiesced in the construction given the statute by appellee.

OPINION OF THE COURT BY JUDGE BURNAM—REVERSING.

In this action we are asked to determine whether the fiscal court of Daviess county can levy and collect a poll tax for the benefit of the county from the inhabitants of

Whitesville, a town of the sixth class, located in its borders, whose municipal authorities have also levied a poll tax of \$1.50 upon the citizens thereof, thus requiring them to pay a double poll tax—one to the town, and the other to the county. The appellees, citizens of Whitesville, applied to the county court, under section 4250 of the Kentucky Statutes, for exoneration from the payment of the poll tax so levied by the county. Upon hearing of the motion, the county court refused to grant the relief sought. Thereupon appellees appealed to the circuit court, by whom it was adjudged that the male inhabitants of Whitesville could not be compelled to pay a poll tax both to the county and the town, and exonerated them from the payment of the county poll tax.

Section 180 of the Constitution provides: "The General Assembly may authorize the counties, cities or towns to levy a poll tax not exceeding \$1.50 per head." And pursuant to this constitutional provision the General Assembly has expressly authorized "counties and cities of the first, second, third, fourth, fifth and towns of the sixth class to impose and collect from every male inhabitant over the age of twenty-one years an annual poll tax not exceeding \$1.50." The contention of appellees is based upon the use of the disjunctive, "or," instead of the conjunctive, "and," between the words "cities" and "towns" in the constitutional provision. Previous to the adoption of the present Constitution, there was no restriction upon the power of the Legislature to levy taxes; and, by its authority, counties, cities, towns and other municipalities levied what appeared to be excessive poll taxes. The only purpose or effect of the section of the Constitution is to limit the amount of such tax which might be levied by counties, cities or towns to not exceeding \$1.50. If it were

otherwise, it would be a race between the county and each incorporated town thereof as to which corporation would make the first levy, thus barring the other from collecting a double poll tax. The citizens of Whitesville are as much interested in maintaining the county government of Daviess county as citizens of the county residing outside of Whitesville. They enjoy advantages which are not shared by their fellow citizens residing outside of the city or town, and they necessarily have to pay therefor; but this does not exonerate them from their share of the burden of maintaining the county government, which has advantages they equally enjoy.

Appellees also seek to escape liability for the payment of the poll tax levied by the county under section 1851 of the Kentucky Statutes, on the ground that they are separated by their act of incorporation from the remainder of the county for governmental purposes. A similar contention was made in the case of *Joyce v. Stone Co.* (23 R., 1201) 64 S. W., 912, and in *Richardson v. Boske* (111 Ky., 893) (23 R., 1209) 64 S. W., 919, in which cases it was held that cities and towns were bound to pay their proportional part of the expenses of both the county and city. The section, however, has no application to cities which are only separated from the county for governmental purposes by their acts of incorporation. Under the Constitution and enactments of the Legislature, a county, through its fiscal court, can levy an ad valorem tax within the constitutional limitations on all property in the county for county purposes, whether situated in the county, outside of cities and towns, or in them, and, in the same way, may levy a poll tax for the same purpose upon citizens both inside and outside of cities or towns located therein.

For the reasons indicated, the judgment is reversed, and the cause remanded for proceedings consistent herewith.

CASE 19—ACTION BY JANE K. BRIDGES AGAINST SUSAN GUIER, &c. TO RECOVER LAND.—NOVEMBER 14.

Guier, &c. v. Bridges.

APPEAL FROM GRAVES CIRCUIT COURT.

JUDGMENT FOR PLAINTIFF AND DEFENDANTS APPEAL AND PLAINTIFF FILES CROSS APPEAL. AFFIRMED ON ORIGINAL APPEAL AND REVERSED ON CROSS APPEAL.

DESCENT AND DISTRIBUTION—INFANT'S REAL ESTATE—RIGHTS OF PARENTS.

Held: 1. Kentucky Statutes, section 1393, provides that realty of an intestate leaving no children or their descendants shall go to his father and mother equally; but section 1401 enacts that if an infant dies without issue, having title to real estate, derived by gift, devise, or descent from one of his parents, the whole shall descend to that one parent. **HELD** that, where an infant's title was through deeds from others than a parent, the land passed to both parents, by section 1393, and not to one, by section 1401, though one of the parents may have paid the purchase money.

LEE & HESTER AND R. A. BURNETT, FOR APPELLANTS.

In 1885 Luther L. Martin, an infant, eighteen years of age, died without issue, the owner of two tracts of land, one of forty acres, conveyed to him by H. Hodges in February, 1883, and the other, twenty-seven acres, conveyed by W. H. Martin, in November, 1884. His father, Wm. Martin, died in April 1900, leaving a will made in December 1891, in which he devised to his wife, Nancy J. Martin, all his real estate during her life, and at her death, his son, I. P. Martin, was to have eighty acres of land and one-half of a thirty-seven and one-half acre tract, and the balance was to go equally to his three daughters, Susan Guier, L. S. Grissom and Eliza Thomas, who are the appellants herein.

Nancy J. Martin, his widow, died six months after her husband, and by her will she gave to the appellee, J. K. Bridges, all her estate, real and personal.

The appellee, Mrs. J. K. Bridges, in this action, claims that at the death of Luther L. Martin, the two tracts of land owned

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by him, forty acres and twenty-seven acres, descended jointly to his father, William Martin and his mother, Nancy J. Martin, and that by the will of Nancy J. Martin, devising all of her estate to appellee, she, appellee, is entitled to one undivided half of said two tracts of land, and asks for a sale thereof and a division of the proceeds.

The appellants claim that the said land was *given* to Luther L. Martin by his father, Wm. Martin, a few years before his death, that Wm. Martin purchased one tract from Hodges and the other from W. H. Martin and had Hodges and Martin respectively to convey same to Luther L., he, the father, paying for same, and that, being gifts from his father, although conveyed by others, the title, at the death of Luther L. Martin passed to the father from whom it came by gift to the son, and under the will of Wm. Martin, the title vested in his three daughters aforesaid, who, by their pleadings ask that their title to said land be quieted as against the claim of appellee, Mrs. Bridges.

Therefore, the only question for the court to decide, is, whether under the laws of descent and distribution, in this State, these two tracts of land which were bought and paid for by Wm. Martin for his son, Luther, although the deeds were made to Luther by the persons from whom they were purchased, descended, at the death of Luther (he being an infant at his death) to his father alone, or to his father and mother jointly?

Our contention is, that the land being clearly shown to be the gift of the father to his infant son, who died in infancy, under our statute, the title, on the death of the son passed by descent to the father from whom it came.

AUTHORITIES CITED.

Kentucky Statutes, chap. 39, sec. 1401; Talbot v. Talbot, 17 B. Mon., p. 1; Power v. Montgomery, 83 Ky., 187.

W. J. WEBB, ATTORNEY FOR APPELLEE.

We contend that the title to the two tracts of land was neither derived by Luther L. Martin from his father, but that one of them was conveyed to him by Hodges and the other by his brother, W. H. Martin.

The fact that the father paid for the land, if he did pay for it, does not constitute a derivation of title from the father when the deed is made by another. The father can not pass a title that he did not own.

It is denied, however, and is not proven that the father paid

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for the land which the son owned, especially as to the forty acre tract. The evidence shows that the son, Luther, had money of his own and that his father had borrowed money of him, and owed him money at the time of his death which was never repaid.

The appellee, by her cross appeal claims that the court erred in dismissing her claim to the twenty-seven acre tract and asks the court to reverse that part of the judgment and to affirm that part as to her ownership of one-half of the forty-acre tract.

AUTHORITIES CITED.

Kentucky Statutes, secs. 1373, 1401; *Walden v. Phillips*, 86 Ky., 302; *Walls v. Chandler*, 1 Ky. Law Rep., 402; *Turner v. Patterson*, 5 Dana, 294; *Applegate v. McClung*, 3 Mar., 304; *Greenleaf on Evidence*, vol. 1, p. 147; *Crosswell's Exrs. and Admrs.*, sec. 227, p. 547.

OPINION OF THE COURT BY JUDGE BURNAM, AFFIRMING ON ORIGINAL AND REVERSING ON CROSS APPEAL.

In 1885 Luther L. Martin died in infancy, the owner of two tracts of land—one of 40 acres, in which he held title by deed from H. Hodges, and the other of 27 acres, by deed from W. H. Martin. Both his father, William Martin, and his mother, Nancy J. Martin, survived him. The father, William Martin, died in 1900, leaving a will by which he devised to his wife, Nancy J. Martin, all of his real estate during her life or widowhood, and at her death to go to his three daughters, Susan Guier, L. S. Grissom and Eliza Thomas, children by a former wife. The wife, Nancy J. Martin, died about six months after her husband, leaving a will by which she devised all of her property, real and personal, to the appellee, Jane K. Bridges, who instituted this suit, claiming that Nancy J. Martin owned by inheritance from her deceased son, Luther L. Martin, the fee to one-half of the two tracts of land owned by him at his death, and asked for a sale and division of the proceeds thereof. Appellants, in their answer, admitted that Luther L. Martin died in infancy, holding title to the two

tracts of land, but allege that these tracts of land were paid for by William Martin, the father of L. L. Martin, who had the title taken to his son, and that, under section 1401 of the Kentucky Statutes, the title descended to the father, to the exclusion of the mother, and passed under his will to his three daughters. The appellee, in her reply, denied that William Martin furnished the money to pay for the lands owned by his son L. L. Martin at his death, and claimed that they were purchased with his own means.

The first section of the statute upon descent and distribution, which is section 1393 of the Kentucky Statutes, provides: "When a person having right or title to any real estate shall die intestate as to such estate without leaving children or their descendants, it shall go to his father and mother, one moiety each." Section 1401 provides: "If an infant dies without issue having the title to real estate derived by gift, devise or descent from one of his parents, the whole shall descend to that parent and his or her kindred as hereinbefore directed, if there is any, and if none, then in like manner, to the other parent and his or her kindred. But the kindred of one shall not be so excluded by the kindred of the other parent, if the latter is more remote than a grandfather, grandmother, uncles and aunts of the intestate and their descendants." In speaking of this statute, Prof. Minor, in his Institutes, says: "This provision mars the symmetry of the original law of descents, and comes not out of Mr. Jefferson's 'quiver of choice arrows.' It arose out of a solicitude to prevent estates going out of the families where they originally belonged, and it is the only instance where any respect is paid by the statute to the blood of the first purchaser." It was enacted substantially in 1790 by the Virginia Legislature, and was adopted as a part of our laws

in 1796. But it has always been most strictly construed, and the statute has been held to apply only to those cases where the title to the real estate owned by the infant came to him by gift, devise, or descent from one of her parents. See *Duncan v. Lafferty's Adm'r* 29 Ky., 47; *Smith's Ex'r v. Smith*, 65 Ky., 522; *Walden v. Phillips*, 86 Ky., 302 (9 R., 569) 5 S. W., 757. The statute does not apply to gifts of money or other personal property, and it is therefore immaterial whether the land owned by the infant was paid for by him or his father. The word "title," when used in connection with real estate, is generally defined to be the evidence of right by which a person has possession of property. And in 2 Bl. Comm., 195, it is defined as the means whereby the owner of land has just possession of the property. The infant's title to the real estate in controversy did not come from his father, but from his vendors. We are therefore of the opinion that when he died in infancy, without leaving issue, the title to the real estate held by him passed, under section 1393 of the statute, to his father and mother in equal moieties; and the moiety with the mother inherited passed under her will to the appellee, J. K. Bridges.

For the reasons indicated, the judgment is affirmed on the original and reversed on the cross appeal, and remanded for proceedings consistent herewith.

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CASE 20—ACTION BY ST. BERNARD COAL COMPANY AND OTHERS
AGAINST HOPKINS COUNTY FOR THE EXPENSE OF GUARDS IN PRO-
TECTING PROPERTY.—NOVEMBER 14.

Hopkins County, &c. v. St. Bernard Coal Company, &c.

APPEAL FROM HOPKINS CIRCUIT COURT.

JUDGMENT FOR PLAINTIFFS AND DEFENDANTS APPEAL. AFFIRMED.

COUNTIES—INDEBTEDNESS—GUARDS SUMMONED TO PROTECT PROPERTY
—NUMBER—DISCRETION OF SHERIFF—CONSTITUTIONAL LAW—AF-
FIDAVIT—RECITALS IN ORDER—PRESUMPTION—ASSIGNMENT OF
CLAIM—ULTRA VIRES.

- Held: 1. Under Kentucky Statutes, section 1241a, authorizing the county judge to order the sheriff or any constable to summon a posse of not less than two nor more than ten men to guard certain property, the discretion of determining the number of men, within the specified limits, of which the party shall consist, is vested in the sheriff, and the order properly left the number of the posse indeterminate.
2. Kentucky Statutes, section 1241a, authorizes the county or circuit judge to order the sheriff to summon a posse to guard property threatened with mob violence, and provides for the payment of the wages of such guards from the county treasury. Const., section 157, provides that no county shall become indebted for any purpose to an amount exceeding in any year the income provided for such year, without the assent of two-thirds of the voters. HELD, that the constitutional prohibition referred only to improvident contracts voluntarily entered into by the county, and not to necessary expenses of government, and did not render section 1241a void.
3. No objection having been made in the court below on the ground that no affidavit was filed before the county judge on which to base the order for the guards, and as the order of the court recites the facts, it should be presumed that the recitals are true in the absence of an express denial and proof to the contrary.
4. Where an action against a county to recover compensation under Kentucky Statutes, section 1241a, for guarding property threatened by mob violence was brought by the original claimants,

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together with a corporation to which they had assigned their claims, an objection that the purchase of the claims by the corporation was *ultra vires* was without merit, because, as the original claimants were before the court, and would have received the money, the county was not prejudiced by a judgment in favor of the corporation.

RUBY LAFFOON, C. C. GIVENS, LEE GIBSON AND M. C. AND
G. D. GIVENS, FOR APPELLANTS.

SYNOPSIS.

1. (a) The case as to the \$1,928 should be reversed because no affidavit was made on which to base the order for guards.

(b) The whole case should be reversed because no cause of action is shown against the county, because the contract of purchase of these county claims was illegal and *ultra vires* on the part of this corporation.

(c) Because the purchase of these ninety-five claims was the doing indirectly the business of banking.

2. (a) The order of the county judge was void because it left to the discretion of the sheriff the number of guards to be placed at each piece of property.

(b) Because the limit of the county indebtedness had already been reached.

3. (a) Because the act of the Legislature, under and by which these guards were appointed, is unconstitutional and void. The reasons and authorities are given under the appropriate head in the following brief.

SUMMARY.

We ask a reversal, because as to the \$1,928, no affidavit was filed, and the county judge had no jurisdiction to make the order. See first amended answer, page 23 of record. Second. Because the contract of purchase of these claims by this coal corporation was unlawful and void. See section 192 of the Constitution and secs. 567, 599 and 601, Kentucky Statutes; Pollock on Contracts, pp. 251-257; Story on Contracts, sec 571; Benjamin on Sales, sec. 530; Beach on Contracts, secs. 1451-1443; Reese on *Ultra Vires*, secs. 56, 69 and 70; National Bank v. Norton, 3 A. K. Marshall, 428; Fray v. Rash, 91 Ky., 344; Bull v. Hagan, 17 B. M., 352. Murphey v. Simpson, 14 B. M., 337; Vannoy v. Balton, 5 B. M., 248; Twheat v. Spurrier, 94 Ky., 22; Franklin Ins. Co. v. L. A. Packet Co., 9 Bush, 456; Blitz v. Bank of Ky., 21 Ky. Law Rep., 1554; Thomas v. W.

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J. R. R., 101 U. S., 71; F. & M. Bank v. Baldwill, 23 Minn., 186; Central Transportation Co. v. Pullman Parlor Car Co., 139 U. S., 25.

3. The county judge had no jurisdiction to make the order for guards. See sec. 157 Constitution of Kentucky; also Con. of Bernard & Co. v. Knox County, Mo., L. R. A., Book 13, p. 244; Board of Commission v. Rollins, 130 U. S., 662.

4. Because the act of the Legislature is unconstitutional and void. See Cooley Constitution Limited, p. 196, 5th edition; Same author, pp. 61, 207-8, 453-4, 505-10, 432; City of Louisville v. Cochran, 82 Ky., 15; Muir v. Henry, 84 Ky., 6.

M. K. GORDON, ATTORNEY FOR APPELLEES.

E. G. SEBREE AND W. L. GORDON, OF COUNSEL.

SYNOPSIS.

1. Chapter 20, Acts 1897 (section 1241a), Kentucky Statutes, is a constitutional exercise of the police power.

2. The act was followed to the letter in every particular and this liability has accrued.

3. The order for guards properly delegated discretion to the sheriff, as to the number of guards summoned within the limits of the act.

4. The constitutional limitations on indebtedness created by section 157 of our Constitution does not apply to compulsory and involuntary liabilities imposed upon the county by the Legislature, but only applies to indebtedness contracted by the county, which its governing authorities had the option to incur or not to incur.

5. The corporation plaintiffs may lawfully take assignment of these claims and maintain actions thereon in their own names; even were this not so the fact that the claims were assigned to the corporations in violation of law, would not help defendants' case.

6. Even if the constitutional limitations of section 157 applies to this liability, still the county must pay as that limitation has not been exceeded.

AUTHORITIES CITED.

Cahill v. Perrine, 20 Ky. Law Rep., 1456; Beard v. Hopkinsville, 95 Ky., 237; Belknap v. City of Louisville, 99 Ky., 486; Sackett v. New Albany, 88 Ind., 45 Am. Rep., 461; Springfield v. Edwards, 84 Ill., 626; Lewis v. Widber, 99 California, 412; McCracken v. San Francisco, 16 Cal., 591; Bloomington v. Perdue, 99 Ill., 329; Rice v. Des Moines, 40 Iowa,

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638; *Congers v. Kirk*, 78 Georgia, 480; *Bartle v. Des Moines*, 38 Iowa, 414; *Chicago v. Sexton*, 115 Ill., 230; *Geo. D. Barnard & Co. v. Knox County, Mo.*, 2 L. R. A., 426; *Crowder v. Sullivan*, 128 Ind., 486; *Rill v. Keokuk*, 15 Iowa, 579; *Tucker v. Raleigh*, 75 N. C., 267; *Laycock v. Baton Rouge*, 35 L. R. A., 475; *Doyer v. Brenham*, 65 Texas, 526; *Comstock v. Syracuse*, 5 N. Y. Sup., 874; *Capital City Water Co. v. Montgomery*, 93 Ala., 366; *Lott v. Waycross*, 84 Ga., 681; *Lehigh Coal & Navigation Co.'s App.*, 112 Pa., 360; *State v. McCauley*, 15 Cal., 430; *Merrill Ry. & Lighting Co. v. Merrill*, 80 Wis., 358; *Smith v. Dedham*, 144 Mass., 177; *Rauch v. Chapman*, Wash., 1897, 36 L. R. A., 408; *Grant County v. Lake County*, 17 Oregon, 453; *Rauch v. Chapman*, 16 Wash., 568; *Potter v. Douglas County*, 87 Mo., 239; *Johnson v. Mason Lodge*, No. 33, I. O. O. F., 21 Ky. Law Rep., 493; *Bank v. Matthews*, 98 U. S., 263; *Miller v. Flemingsburgh & Fox Springs Turnpike Co.*, 22 Ky. Law Rep., 1039; *Culver v. Yocum*, 9 Ky. Law Rep., 148; *Ashuelot National Bank v. Lynn County, Iowa*, 81 Fed., 121; *Kelly v. Pierce County*, 44 Pacific, 136; *Council Bluffs v. Stewart*, 51 Iowa, 385.

OPINION OF THE COURT BY JUDGE HOBSON—AFFIRMING.

The appellee John Robinson and 95 others, suing for the use and benefit of the St. Bernard Mining Company, and that company for itself, filed this suit against the county of Hopkins and the members of the Hopkins fiscal court, asserting claims amounting in the aggregate to \$2,408 against the county of Hopkins, growing out of their services in guarding the property of the St. Bernard Coal Company when summoned by the sheriff pursuant to an order of the county judge of Hopkins county, under section 1241a, Kentucky Statutes. The court gave judgment in favor of the plaintiffs, and the defendants have appealed.

The validity of this statute was upheld by this court in *Cahill v. Perrine* 20 R., 1454, 49 S. W., 344, and upon a re-examination of the question we see no reason to recede from the conclusion then reached. The material parts of the statute are set out in that opinion, and all the grounds of objection to it which are now made, as shown by the

opinion and dissenting opinion, were considered by the court. The statute authorizes the judge to "order the sheriff or any constable of the county to summon a posse of not less than two nor more than ten discreet, able-bodied men between twenty-one and fifty years of age, for each piece of property threatened with injury or destruction, to be placed at or in such property armed with guns and ammunition, until the judge is satisfied the cause no longer exists, not to exceed thirty days at one time." The discretion of determining whether the posse shall consist of only two men or more than two (but not more than ten) is vested in the sheriff. The county judge is not required to fix the number to be summoned by the sheriff, for he, on the ground, can determine this as there may be need. The county judge, therefore, in his order in the case before us, properly followed the language of the statute, and left the number of the posse to be determined by the sheriff within the limits fixed by the statute. If no discretion was left to the sheriff as to the size of his posse in time of exigency, the purpose of the act might be entirely defeated, or greatly unnecessary cost might be entailed.

It is insisted that the liability thus imposed on the county is in violation of section 157 of the Constitution, which, so far as material is as follows: "No county, city, town, taxing district, or other municipality shall be authorized or permitted to become indebted in any manner or for any purpose to an amount exceeding in any year the income and revenue provided for such year, without the assent of two-thirds of the voters thereof voting at an election to be held for that purpose, and any indebtedness contracted in violation of this section shall be void. Nor shall such contract be enforceable by the person with whom made; nor shall such municipality ever be authorized to assume

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the same." It is a part of the history of this State that in times of popular excitement many of the counties and towns of the State had voted subscriptions to railroads and other public improvements, which had well-nigh wrecked them; and this section of the Constitution, which was borrowed from other States was adopted as a remedy for the evil. *Beard v. Hopkinsville*, 95 Ky., 237 (15 R., 756) 24 S. W., 872, 23 L. R. A., 402; 44 Am. St. Rep., 222. In *Belknap v. City of Louisville*, 99 Ky., 486 (18 R., 313) 36 S. W., 1118; 34 L. R. A., 256, 59 Am. St. Rep., 478, construing this provision, the court said that the object of the provision was to protect the people from their own improvidence and that of their officials. That improvident contracts were in the mind of the framers of the Constitution is shown by the concluding words, "nor shall such contract be enforceable by the person with whom made." The prohibition is against becoming indebted or voluntarily incurring a legal liability. The words, "no county . . . shall be authorized or permitted to become indebted," can not reasonably refer to the necessary expenses of the governmental functions of the county, which are compulsory obligations cast on it by law, but only to that class of which is optional with the county to incur. Any other construction, as has been well said, would destroy the fundamental safeguards and bulwarks of organized society. *Barnard & Co. v. Knox Co. (C. C.)*, 37 Fed., 563, 2 L. R. A., 426; *Rauch v. Chapman (Wash.)*, 48 Pac., 253, 36 L. R. A., 408, 58 Am. St. Rep., 52; *Grant County v. Lake County*, 17 Or., 453, 21 Pac., 447; *Sackett v. New Albany*, 45 Am. Rep., 461. The duty of preserving the public peace and protecting life and property can not be avoided because the income provided for the year by the fiscal court will be insufficient to pay the guards provided by the stat-

ute. It is the duty of the fiscal court to provide a sufficient fund for this purpose when the necessity arises, if it has not been provided before. It was not the purpose of the Constitution to disable the municipalities of the State from maintaining the public peace or protecting the good name of the State. On the contrary, the Constitution was enacted by its makers, "grateful to Almighty God for the civil, political and religious liberties we enjoy," and that "the great and essential principles of liberty and free government may be recognized and established." See preamble.

No objection appears to have been made in the circuit court on the ground that no affidavit was filed before the county judge—at least, this matter is not noticed in the opinion of the trial court; and as the order of the county court recites the facts, it should be presumed that the recitals are true, in the absence of an express denial and proof to the contrary.

The original claimants uniting in the suit with the assignee, the St. Bernard Mining Company, and no objection being made to the joinder of parties, no question is presented as to whether that company could have sued in its own name alone. The objection that its purchase of the claims was *ultra vires*, and therefore vested no title in it to them, can not be maintained. The original claimants are before the court. The money was going to them, if not to the mining company, and the county has not been prejudiced by the form of the judgment.

Judgment affirmed.

Chief Justice Guffy and Judge White dissent.

Gaertner v. Louisville Artificial Stone Company.

CASE 21—ACTION BY LOUISVILLE ARTIFICIAL STONE COMPANY AGAINST P. A. GAERTNER TO ENFORCE THE LIEN OF AN APPORTIONMENT WARRANT.—NOVEMBER 14.

Gaertner v. Louisville Artificial Stone Co.

APPEAL FROM JEFFERSON CIRCUIT COURT, CHANCERY BRANCH, FIRST DIVISION.

JUDGMENT FOR PLAINTIFF AND DEFENDANT APPEALS. AFFIRMED.

MUNICIPALITIES—STREET IMPROVEMENTS—APPORTIONMENT WARRANT
LIEN—ORDINANCE—PLEADING—PROOF—PRIMA FACIE CASE.

Held: 1. Under Kentucky Statutes, section 2775, requiring the courts to take judicial notice of city ordinances and section 119, Civil Code, providing that facts of which judicial notice is taken need not be pleaded, and that in pleading a private statute it is sufficient to refer to it by its title and date, it is sufficient in a suit to enforce the lien of an apportionment warrant for street improvements to refer to the ordinance under which the apportionment was made by its title and date.

2. Kentucky Statutes, section 2838 providing that "in actions to enforce liens for street improvements, a copy of the contract therefor and the apportionment duly attested shall be *prima facie* evidence of all facts necessary to be established by plaintiff," and the plaintiffs alleging that the street, improved, had been used as a street for more than forty years, and the grade had been fixed, but the record thereof could not be found, and the answer denying that the grade had been fixed as pleaded but not denying that the street had been used or that the sidewalk had been constructed and remained on that grade for forty years, there was no sufficient denial of the allegations of the petition, and the plaintiff having made out a *prima facie* case, he was entitled to recover on his apportionment warrant.

3. The case of *Nevin v. Gaertner*, 20 R., 1022 (48 S. W., 153) and *Richardson v. Dunn's Assignee*, 22 R., 324 (57 S. W., 230) are disapproved so far as they are in conflict herewith.

HARRIS & MARSHALL, ATTORNEYS FOR APPELLANT.

1. The petition does not set out the terms of the ordinance of

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February 5, 1894, nor does it aver that said ordinance was duly passed, nor is a copy thereof filed. This is a fatal defect. *Nevin v. Gaertner*, 20 Ky. Law Rep., 1022.

2. Under the decision in *Zabel v. Orphans' Home*, 92 Ky., 94, it is necessary to allege and prove an ordinance or resolution fixing the grade of the street. Defendant moved to require plaintiff to file a copy of this resolution but his motion, was overruled, and no copy was ever filed.

The answer traverses the whole allegation of the plaintiff on this subject, and no proof was taken by either party.

3. But one day's notice by publication in a newspaper was given of the engineer's inspection and reception of the work. This, we think was too short.

AUTHORITIES CITED.

1. *Nevin v. Gaertner*, 20 Ky. Law Rep., 1022.

2. *Zabel v. Orphans' Home*, 92 Ky., 94; *Henderson v. Brown*, 7 Ky. Law Rep., 609.

3. *Harris v. Zabel*, 4 Ky. Law Rep., 1000; *Boone v. Gleason*, 5 Ky. Law Rep., 325; *Ormsby v. Jamison*, 9 Ky. Law Rep., 325; *Henderson v. Lambert*, 14 Bush, 24; *Bogard v. O'Brien*, 14 Ky. Law Rep., 648; *Whitfield v. Hipple*, 11 Ky. Law Rep., 386.

OPINION OF THE COURT BY JUDGE HOBSON—AFFIRMING.

This is a suit to enforce the lien of an apportionment warrant for a granitoid pavement in front of appellant's property on Market street, between First and Second. The ordinance directed the pavement to be made in accordance with the provisions of the general ordinance concerning sidewalks. The contract binds the contractor to do the work as required by the ordinance. It is insisted that the petition does not sufficiently set out the general ordinance in accordance with the provisions of which the improvement was to be made, and in support of this contention we are referred to *Nevin v. Gaertner* (20 R., 1022), 48 S. W., 153. The language of the petition is that the work was directed to be done "in accordance with the provisions of an ordinance approved 5th day of February, 1894, entitled 'Gen-

eral ordinance concerning the improvement of sidewalks.' ” By section 2775, Kentucky Statutes, the courts of the State must take judicial cognizance of the ordinances of the city. By section 119 of the Civil Code, facts of which judicial notice is taken, excepting private statutes, shall not be stated in a pleading, and in pleading a private statute it is sufficient to refer to it by stating its title and the day on which it became a law. As the court is required to take judicial notice of the ordinances of the city, the terms of the ordinance need not be set out, and it is sufficiently pleaded when its title and the day on which it became a law are stated. Since the court is required to take judicial notice of the ordinances, they are, in effect, private statutes, within the meaning of the provision of the Code above referred to, and we see no reason for any greater particularity in pleading them. This form of allegation was held sufficient in *Dumesnil v. Tile Walk Co.* (23 R., 144) 58 S. W., 705. In *Nevin v. Gaertner* the attention of the court was not drawn to section 2775, Kentucky Statutes. The petition was held defective, and the court followed a ruling made under the former statute, not observing the change that the Legislature had made.

It was alleged in the petition that Market street, between First and Second, had been for more than 40 years used as a street, and that the grade had been fixed by the council at the time of the original construction of the sidewalk, more than 40 years ago, but that the record establishing the grade could not be found. The ordinance simply directed the reconstruction of the sidewalk. The answer of the defendant denied that the grade of Market street had been fixed 40 years ago, or when the sidewalk was originally constructed. But it did not deny that Market street had been used as a street for 40 years, or suffi-

ciently deny that the sidewalk had been constructed long ago on the existing grade, and had remained upon that grade since that time. The answer may be true, and yet the grade may have been established 39 years ago, and the sidewalk may have been maintained upon it ever since. Section 2838, Kentucky Statutes, provides: "In all actions to enforce liens a copy of the ordinance authorizing the improvement or work, a copy of the contract therefor, and a copy of the apportionment, each attested by the comptroller, shall be *prima facie* evidence of the due passage, approval and publication of the ordinance, of the due execution and approval of the contract, and shall also be *prima facie* evidence of every other fact necessary to be established by the plaintiff in such action to entitle him to the relief authorized to be given in this act." In *Barrett v. Stone Co.* (20 R., 669) (52 S. W., 947), where precisely this question was made, the court held that a copy of the ordinance authorizing the improvement, the contract therefor and the apportionment duly attested made out for the plaintiff a *prima facie* case, under the statute. In the case before us the *prima facie* case was thus made out, and, the action being submitted without any further proof by either party, the court gave judgment in favor of the plaintiff. It is insisted for appellant that the judgment is in conflict with the case of *Richardson v. Dunn's Assignee* (22 R., 324) 57 S. W., 230. But in *Richardson v. Dunn's Assignee*, the answer was a complete traverse of all the allegations of the petition, which is not true of the answer before us. In *City of Augusta v. McKibben* (22 R., 1224) 60 S. W., 291. this court, construing a similar ordinance, said: "The old sidewalk was condemned, and a new one was required to be laid. That is all the ordinance or contract provided for. The grade of the street was, by neces-

sary inference, left as it was before." The language of the statute, that the copies referred to therein shall be *prima facie* evidence of the due passage, approval and publication of the ordinance, of the due execution and approval of the contract, and shall also be *prima facie* evidence of every other fact necessary to be established by the plaintiff to entitle him to the relief sought, imposes upon the defendant the burden of showing facts sufficient to defeat the action where this *prima facie* case is made out; and a fair construction of the statute does not warrant the court to interpolate into it an exception which the Legislature has not seen fit to make. Our conclusion is that, when the plaintiff has made out his *prima facie* case under the statute, he is entitled to recover, unless proof is taken by the defendant, or the facts are otherwise shown in the action, overthrowing the *prima facie* case thus made out. The case of *Zabel v. Orphans' Home*, 92 Ky., 89 (13 R., 385) 17 S. W., 212 (13 L. R. A., 668), does not conflict with this view, but, on the contrary, sustains it. That was an appeal from a judgment entered without proof after the court had overruled a demurrer. It was held that the demurrer to the petition should have been sustained, but the court, to make plain its meaning, said: "Under the charter of the city, the proper averment in its petition of all the steps leading to the creation of such a lien, when supported by such exhibits as were filed in this instance, creates, in the face of a mere denial, a *prima facie* case. Hence, if the petition was sufficient, . . . the plaintiff was, in the absence of testimony, entitled to judgment." The defect in the petition referred to, for which the demurrer was sustained, was its failure to show that the grade of the street had been fixed. It will thus be seen that the court in that case distinctly held that if the petition had contained the

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necessary averments, supported by the exhibits, creating a *prima facie* case, a mere denial of its allegations would be insufficient, in the absence of testimony to defeat a recovery. The cases of *Nevin v. Gaertner* and *Richardson v. Dunn's Assignee*, above referred to, are disapproved, so far as they are in conflict herewith.

Judgment affirmed.

The whole court sitting.

CASE 22—PROCEEDING BY THE COMMONWEALTH BY THE AUDITOR'S AGENT AGAINST THE LEXINGTON CEMETERY COMPANY TO SUBJECT THE FUNDS OF SAID COMPANY TO TAXATION.—NOVEMBER 18.

114	165
4116	723
114	165
4116	723

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114	165
4116	723
136	257

APPEAL FROM FAYETTE CIRCUIT COURT.

JUDGMENT FOR DEFENDANT AND PLAINTIFF APPEALS. REVERSED.

TAXATION—FUNDS OF CEMETERY COMPANY.

Held: Funds of a cemetery company derived from the sale of lots therein, are not exempt from taxation under Constitution, section 170, and Kentucky Statutes, section 4026, exempting from taxation "places of burial not held for private or corporate profit" and "institutions of purely public charity."

L. J. MOORE, ATTORNEY FOR APPELLANT.

There is no intention on the part of appellant in this case, to have any of the property which has been sold or used for burial purposes assessed for taxation, but only such as appellee has used for corporate purposes, and none of the property which appellee uses for burial purposes was described in the pleadings.

The evidence shows that the directors of this cemetery bought 106 acres of ground for \$40,000 cash and sold a portion thereof for \$48,000, thereby making a clear profit of \$48,000, from the sale of ground which they never used for burial purposes at all, all of which is a corporate profit and not one cent of this sum has been used except for corporate profit.

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Our contention is, that this corporate fund is not exempt from taxation under the claim of an "institution of purely public charity," or under any provision of the Constitution or statutes of the State of Kentucky now in force.

AUTHORITIES CITED.

Morris v. Lone Star, chapter No. 6 Royal Arch Masons, 5 S. W., 519; Com. v. Masonic Temple Co., 10 Rep., 325; Redemptionist Fathers v. Boston, 129 Mass., 178; Academy v. Exeter, 58 N. H., 306; Indianapolis v. Grand Masters, 25 Ind., 518; Colace v. State, 19 Ohio, 110; State v. Board of Assessors, 35 La., 668; Morgan v. Louisiana, 95 U. S., 221; Wilson v. Gains, 103 U. S., 417; L. & N. R. R. Co. v. Palmer, 109 U. S., 224; Bradley v. McAtee, 7 Bush, 667; E. & H. R. R. Co. v. Com., 9 Bush, 439.

MORTON & DARNALL AND J. D. & G. R. HUNT, ATTORNEYS FOR APPELLEE.

1. The appellee's liability to taxation prior to the year 1893 must be determined by the terms of the revenue act in force up to November, 1892, which was then superseded by the present law. The language of that act, which was approved May 17, 1886, is so plain on the point in issue, as to leave no room for controversy. That statute exempts from taxation "public schools, churches, and all property of seminaries, asylums, hospitals, infirmaries and colleges, and all other funds devoted to charitable purposes, and church parsonages and public cemeteries, except those owned by joint stock companies or associations which declare a dividend."

This language we submit is conclusive, and will admit of no other construction than the one for which we contend.

2. The exemption from taxation claimed by appellee for 1893 and later years, must be determined by the construction of the revenue act of 1892, now section 4026, Kentucky Statutes, providing exemption in the same terms as provided in section 170 of the present Constitution which exempts all "institutions of purely public charity."

Our contention is, that the Lexington cemetery company is an "institution of purely public charity" within the meaning of the Constitution and statutes above mentioned.

On general principles and without reference to the special authorities hereinafter cited, we submit that it can not be doubted that the objects of this company are clearly and distinctly charitable within the well established principles on that subject. Humanity and religion are alike imperative in the

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demand that the dead must be buried. Whoever therefore performs or aids in the performance of that duty to that extent, relieves the government of a public burden, and on this principle a public cemetery is held to be a public use, authorizing the exercise of the power of eminent domain, which, as is well known, can only be called into existence for uses strictly public in their nature.

A charity is none the less a public one because its benefits can not extend to every individual in the community; provided it embraces, within the benefits, all, or as many as practicable, of the class or classes intended to be served; nor does it contravene the object of a charity that reasonable charges are, in proper cases, made for services rendered, provided the income thus derived is applied to the object of the association as contra distinguished from gain to the promoters.

AUTHORITIES CITED.

Constitution, sec. 170; Kentucky Statutes, sec. 4026; Ould v. Washington Hospital, &c., 95 U. S. Rep., 311; Perry on Trusts, sec. 687; Trustees Ky. Female Orphan School v. City Louisville, 100 Ky., 478; Mills on Eminent Domain, sec. 19; 6 Am. & Eng. Ency. of Law, p. 528; 4 Am. & Eng. Ency. of Law, p. 272 and note; Evergreen Cem. Asso. v. Becker, 52 Conn., 551; (3 Atlantic Rep., 353) Long v. Rosedale Cem., 84 Fed. Rep., 135; Railway Co. v. Arlutt, 19 U. S., App., 612; Johnson v. Hallifield, 79 Ala., 423; (58 Am. Rep., 598) Rhymer's Appeal, 93 Penn., 142; (39 Am. Rep., 736) Bates v. Bates, (134 Mass.) 45 Am. Rep., 305; Hopkins v. Crenshaw, 165 U. S., 352; Perry on Trusts, 5th ed., vol. 2, sec. 706.

OPINION OF THE COURT BY JUDGE BURNAM—REVERSING.

This proceeding was instituted, under section 4241 of the Kentucky Statutes, by the auditor's agent for Fayette county against the Lexington Cemetery Company, to have assessed for taxation, as omitted property, certain notes, bonds, and cash belonging to the company from 1880 to 1893, inclusive. The judgment of the county court was to the effect that \$43,000 in notes and cash, belonging to the company, was liable to taxation since the adoption of our present Constitution. An appeal by the company to the Fayette circuit court resulted in a judgment setting

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aside the order of the county court, and the Commonwealth has appealed to this court.

The Lexington Cemetery Company was incorporated by an act of the General Assembly in February, 1848. It was empowered to acquire ground, plat it into lots, and sell them exclusively for burial purposes, and apply the proceeds to the improvement and ornamentation of the cemetery, and the incidental expenses necessary to keeping it in repair. It was not organized for profit, and no dividends have ever been declared, and no salaries are paid to any of its officers. But under their management it has become a beautiful city of the dead, "vast, ornate, and in scrupulous condition." The bodies of more than 14,000 persons sleep under its sod. Among them are the bones of some who in life shed immortal glory upon the nation. Neither talent, taste nor money have been spared to make it worthy of the universal sentiment of reverence for the burial places of the dead which springs from the Christian belief in the final resurrection of the body. More than \$6,000 is spent annually in ornamentation and care of the grounds. Yet so able and judicious has been the management that the company has on hand a large sum of money, the proceeds, in the main, of lots sold, the prices of which range from \$6 for a place for a single burial, to much higher prices, according to the extent and location of the lot; and it is this fund which the Commonwealth seeks in this proceeding to subject to taxation.

None of the previous Constitutions recited specifically the property which should be exempt from taxation, and the General Assembly enjoyed and exercised a very wide discretion in matters of this kind, especially when the property of any form of charitable institution was involved. The act of 1873, which is found in the Revised Statutes, ex-

empted from taxation "real estate and investments devoted to public graveyards." This was followed by the act of 1886, found in chapter 92, art. 1, section 9, subsection 5, of the General Statutes, which exempted from taxation "all property owned by public cemeteries, except those owned by joint-stock companies, which declared dividends." We think it is perfectly clear that under the laws that existed prior to 1893 the funds of cemetery companies were exempt from taxation; but appellee's claim to exemption for 1893 and all subsequent years must be determined from the provisions of section 170 of the Constitution and section 4026 of the Kentucky Statutes, which was enacted in conformity therewith by the General Assembly, and which reads as follows: "There shall be exempt from taxation public property used for public purposes; places actually used for religious worship with grounds attached thereto, and used and appurtenant to the house of worship, not exceeding one-half acre in cities or towns and two acres in the country; places of burial, not held for private or corporate profit; institutions of purely public charity." Both the Constitution and statute distinguish between the "places of burial" and "institutions of purely public charity," and whilst we are not disposed to question the soundness of the contention that appellee is to some extent, at least, a quasi charitable institution, the authorities in support of this contention are somewhat meager. Perry, Trusts, section 706, says: "It is now settled that trusts to maintain burying grounds of the donors are so far charitable that they will be carried into effect." And in support of the text he cites the case of *Dexter v. Gardner*, 7 Allen, 243, and *Swasey v. Society*, 57 Me., 523. In *Dexter v. Gardner*, the bequest provided that the income should be appropriated for the benefit of the "Friends' Meeting,"

and it was held to be valid because the purchase and repair of burying grounds was regarded by Friends as one of their religious duties, to which, under their usages and discipline, they applied their funds. It was a good bequest to a religious society for religious purposes. In *Swasey v. Society* the court said bequests for the repair of tombs have been recognized as charitable. And in the great case of *Jones v. Habersham*, 107 U. S., 174, 2 Sup. Ct., 336, 27 L. Ed., 401, a bequest to keep a burial place in good order was held to be valid because the Georgia Code enumerates among charitable usages the improvement and repair of burial grounds and tombstones. But we are unable to see how the doctrine applied in these cases can be so extended as to exonerate the funds sought to be subjected to taxation in this case as devoted to a purely public charity. The ground on which this contention is argued by counsel is that humanity and religion require that the dead shall be buried, and that, if this office be not performed by friends, relatives, or associations formed to aid in the purpose the burden must fall on the public in its organized capacity, and that, in consequence, whoever performs or aids in the performance of this public duty relieves to that extent the government of a public burden, and, when done without expectation of reward by the association, entitles it to be classified as an institution of "purely public charity." A similar contention, based upon a more plausible line of reasoning, was made in *City of Newport v. Masonic Temple Ass'n*, 108 Ky., 332 (21 R., 1785) (56 S. W., 405, 49 L. R. A., 252), and in response thereto this court said: "There are many commendable organizations, owning a large amount of property, and doing often much work of benevolence, such as the Knights of Pythias, the Elks, the Odd Fellows, the Red Men, Sons of Temperance,

and the like; but so long as they confine their beneficence to their own members or their widows or orphans, or are designed for charitable purposes purely public, they can not be regarded as institutions of purely public charity within the meaning of our Constitution. To so hold would be to give substantially no effect to the words 'purely public,' in that instrument, and leave few, if any, private charities which would not be exempt from taxation. The section is framed so minutely that it is impossible to escape the conclusion that it was designed to narrow exemption from taxation, and to limit them to the objects expressly named. It must be fairly construed, with a view to promote its purposes, and the exemptions allowed by it can not be extended by implication." And in the case of *Widows' and Orphans' Home of Odd Fellows of Kentucky v. Bosworth* (23 R., 1505), 65 S. W. 591,—where a similar contention was made, the court said: "The framers of the Constitution knew very well that there were many institutions of private charity, which were doing much good, and were maintained by voluntary contributions, without gain or profit. If they had designed to exempt these institutions, they had only to retain the phraseology of the law then long in force, which exempted public schools, churches, and all property of seminaries," etc. ". . . They evidently intended to change the rule which exempted all property which was devoted to charitable purposes, and from which no profit or gain was made, and to exempt only institutions of purely public charity." It is true that all persons who are willing and able to pay the prices charged may have lots in appellee's burying grounds and become stockholders, but certainly this does not bring them within the scope of institutions of purely public charity. Whilst we fully appreciate and approve the well-nigh universal

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sentiment that the graves of the dead should be decently and tenderly cared for, there can be no escape from the conclusion that appellee is not an institution of purely public charity, as contemplated by the Constitution and statute. And whilst their place of burial is expressly exempted, we are of the opinion that the money and notes held and owned by them are liable to taxation.

For the reasons indicated, the judgment is reversed, and the cause remanded for proceedings consistent with this opinion.

Whole court sitting.

Judges Paynter and O'Rear dissenting.

Petition for rehearing by appellee overruled.

CASE 23—ACTION BY JUDY BELCHER AGAINST C. B. HELTON FOR TRESPASS TO LAND—NOVEMBER 18.

Helton v. Belcher.

APPEAL FROM LESLIE CIRCUIT COURT.

JUDGMENT FOR PLAINTIFF AND DEFENDANT APPEALS. AFFIRMED.

TRESPASS ON REALTY—EVIDENCE—TITLE BOND—PROOF OF EXECUTION
—COMMISSIONER'S DEED—ENDORSEMENT THEREON BY COURT.

- Held: 1. A title bond for land patented and afterwards carried into grant, which had been assigned by the patentee to S. and by S. to T. and by T. to the appellee more than twenty years ago, and under which appellant had entered looking for title to appellee, who held under it, was properly received in evidence without proof of its execution.
2. Under Kentucky Statutes, section 519, providing that "certified copies of all instruments legally recorded shall be *prima facie* evidence in all courts in this State," a certified copy of a commissioner's deed, which shows that said deed was examined and approved by the court and so endorsed, is ad-

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missible in evidence without proof of the judgment authorizing it.

TINSLEY & FAULKNER, ATTORNEYS FOR APPELLANT.

This was an action of trespass in nature of an ejectment and appellee must rely on her own title which must be made out by competent testimony.

The evidence of title relied on by appellee in the court below was a commissioner's deed not supported by any judgment, and an unproved title bond, the introduction of which were excepted to, also a patent to John Hutchens.

Having shown by the patent, title to the land in John Hutchins, it devolved on appellee to connect herself with that title, which she failed to do. A commissioner's deed is not evidence of title unless supported by a judgment and proceedings authorizing it. *Maguire v. Kowns*, 7 Mon., 386.

A paper purporting to be a title bond is no evidence against any one unless its execution is proved in some regular way. Civil Code, sec. 604; *Roberts v. Tennal*, 3 Mon., 250.

Appellant was entitled to a peremptory instruction at the close of the evidence and the motion therefor should have been sustained.

OPINION OF THE COURT BY JUDGE HOBSON—AFFIRMING.

On December 5, 1871, John Hutchens obtained from the Commonwealth a patent for 100 acres of land in Clay county, and on February 1, 1877, he sold the land by title bond to Benjamin Saylor, who assigned the bond to W. J. Taylor, and by him it was assigned to appellee, Judy Belcher. After this, Stokley Belcher, her husband, sold about fifty acres of the land to appellant, Carlo Helton, for \$20, which was paid in a cow; but his wife declined to stand to the trade, and refused to make Helton a deed, and he then tendered back to Helton the amount paid, but Helton refused to receive it. After this, Helton cut some timber off the land, and Judy Belcher instituted this suit against him to recover in damages for the cutting of the timber. He denied her title, and on final hearing there was a verdict and judgment in her favor for \$9, from which he appeals.

The ground of reversal relied on is that the court allow-

ed her to read in evidence the title bond above referred to, without proof of its execution; also a commissioner's deed made to her pursuant to the bond, without the judgment under which it was made. As the title bond was more than twenty years old, came from the proper custody, and had been carried into grant, and appellant had entered, looking for title to appellee, who held under it, it was properly received in evidence without proof of its execution. The common-law rule was that a commissioner's deed should not be admitted in evidence unless supported by the judgment authorizing it; yet it was not necessary to produce the previous proceedings, but only the decree itself, and the conveyance made in conformity to it. *Grebbin v. Davis*, 9 Ky., 16. But by our Code of Practice it is provided that a commissioner's deed shall "refer to the judgment, orders and proceedings authorizing the conveyance, so that the same may be readily found, and that it "shall pass to the grantee the title of all the parties to the action or proceeding." It must be examined and approved by the court, and its approval "shall be endorsed on the conveyance and recorded with it." Civil Code, secs. 395-398. It must be recorded where by law it would have been recorded if made by the parties in person. Civil Code, sec. 400. By section 519, Kentucky Statutes, it is further provided: "Certified copies of all instruments legally recorded shall be prima facie evidence in all courts and tribunals of this State." It will thus be seen that these statutes taken together, in substance provide that the deed, when examined and approved by the court, and so indorsed, may be legally recorded, and that a certified copy of this record shall be prima facie evidence in the courts of the State. When a deed is made by an agent, his power of attorney must be introduced, else his authority to make

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the deed is not shown. And so, independently of the statute, when a commissioner's deed is introduced, the judgment authorizing him to make it must be shown; for he is a mere ministerial officer, and there is no presumption in favor of his authority. But when, under the statute, the approval of the court is indorsed on the deed, this evidences the authority of the commissioner to make it. There is a presumption in favor of the regularity of judicial proceedings, and the deed so indorsed is therefore prima facie regular. The production of the judgment would show nothing more than the indorsement of the court's approval on the deed shows. This indorsement entitles the deed to be recorded, and a copy of this record is prima facie evidence under the statute. We are therefore of opinion that the court did not err in allowing the title bond or the copy of the recorded deed to be read in evidence.

Judgment affirmed.

CASE 24—ACTION BY SUSIE HUGHES AGAINST THE SUPREME COMMANDERY OF THE UNITED ORDER OF THE GOLDEN CROSS OF THE WORLD TO RECOVER ON A BENEFIT CERTIFICATE.—NOVEMBER 26.

Supreme Commandery of the United Order of the Golden Cross of the World v. Hughes.

APPEAL FROM M'CRACKEN CIRCUIT COURT.

JUGMENT FOR PLAINTIFF AND DEFENDANT APPEALS. AFFIRMED.

LIFE INSURANCE—FRAUDULENT REPRESENTATIONS—APPLICATION TO ACCOMPANY POLICY—ANSWER—DEMURGER.

1. Kentucky Statutes, sec. 679, requiring that the application or charter and by-laws of an insurance company doing business

114	175
1114	338
1114	368

114	175
1127	358

114	175
1138	368

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under the laws of the State, or a copy thereof, shall be attached to the policy before it can be treated as part of the contract and used in evidence, applies to assessment co-operative companies doing business on the lodge plan.

2. Where an answer in an action on a mutual benefit certificate did not allege reliance on any representations, except those made in the application, which were alleged to be fraudulent, and that part of the answer alleging such representations was properly stricken because the application was not made a part of the policy, as required by Kentucky Statutes, sec. 679, a demurrer to the answer was properly sustained.

W. M. REED AND GREER & REED, FOR APPELLANT.

The only questions involved are as to the correctness of the rulings of the court below, in sustaining a motion to strike out the greater part of appellant's answer, and sustaining a demurrer to the remainder thereof, and a determination of these questions involves a construction of sections 641 and 679, Kentucky Statutes.

The answer alleged that appellant was a secret fraternal order and had lodges which were under the supervision of a grand supreme body, and that said subordinate lodges (in one of which appellee's deceased husband was a member) acquired members therein through the lodge system exclusively, and that it did not pay any commission to or employ any agents except in the organization and supervision of the work of its local subordinate lodges, and that under its articles of incorporation, "Grahamville Commandery No. 803," had been organized and was subject to the rules, laws and regulations pertaining to said local or subordinate lodges, and the members thereof had a right to receive policies of insurance in compliance with said rules and regulations, and that on the conditions set forth in the application of the assured for membership therein, and in consideration thereof, and according to the terms of the benefit certificate sued on, the application of the deceased was made a part thereof.

The appellant then set out specifically its defense, alleging various representations and warranties of said assured in his application for membership in said order, and the breaches thereof, all of which are fully set out in the answer.

The court below appears to have acted on the idea that the application could not be used as evidence to sustain the allegations of the answer unless the same, or a copy thereof, was attached to the benefit certificate sued on.

We insist that section 679 of the Kentucky Statutes, which requires that the application or Constitution and by-laws of an in-

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insurance company, doing business under the laws of Kentucky, or a copy thereof, shall be attached to the policy before it can be treated as a part of the contract or used in evidence on the trial of a case, does not apply to an order like the appellant.

We maintain that there is not a single line from the beginning to the end of chapter 32, Kentucky Statutes, that can be made to apply to secret fraternal orders, issuing benefit certificates, as in appellant's case, and that it was the evident intention of the Legislature, in section 641, to exempt orders of this kind from all the provisions of said chapter. Such a construction as has been given by the lower court would render the exception provided for in section 641 absolutely nugatory, notwithstanding the plain legislative intent therein expressed.

AUTHORITIES CITED.

Am. & Eng. Ency. of Law, 2d ed., p. 1051; *Sherman v. Com.*, 82 Ky., 102.

R. T. LIGHTFOOT AND BLOOMFIELD & CRICE FOR APPELLEE.

The entire defense of the appellant in this action is based upon the statements made by assured in his application which is not incorporated into or set out in the insurance policy or benefit certificate, and no copy thereof is in any way attached to or accompanying said policy or certificate, and, as we insist, form no part of the insurance contract.

For this reason all the allegations in the answer, referring to statements, &c., contained in said application and relied on as a defense, were on motion of appellee stricken out.

With these allegations out, the answer presented no valid defense and a demurrer was properly sustained to it by the court.

It is not alleged in the answer, nor is it contended in this case, that the application of the assured, or any part of it, is embraced in the certificate or policy, or that any copy thereof is in any wise attached to or accompanying said certificate. nor does it show that the constitution, by-laws or other rules of the appellant were, in any wise, embraced in the certificate of insurance or attached to it, and therefore we insist that under section 679, Kentucky Statutes, said application, Constitution, by-laws, &c., can not be considered a part of the policy or of the contract between the parties.

From the record, it is evident that appellant is doing simply a life insurance business—no aid or charity or other benefit is promised or given by the certificate to its members or their families except the \$1,000 promised to be paid under the cer-

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tificate sued on, and there was no other inducement promised to its members for their payment of assessments.

AUTHORITIES CITED.

Kentucky Statutes, secs. 656, 664, 679; Prov. S. L. Assn. So. v. Puryear's Admr., 22 Rep., 982; Rice v. Rice's Admr., 23 R., 636; Sherman v. Com., 82 Ky., 105.

OPINION OF THE COURT BY JUDGE BURNAM—AFFIRMING.

This suit was brought by appellee, Susie C. Hughes, against the appellant, the Supreme Commandery of the United Order of the Golden Cross of the World, to recover \$1,000 on a benefit certificate issued by appellant on the life of her deceased husband, Francis M. Hughes, which reads as follows: "This certificate is issued to Francis M. Hughes, member of the Grahamville Commandery, 803, of the United Order of the Golden Cross, located at Grahamville, Kentucky, upon evidence received from said commandery that he is a contributor to the benefit fund of this order, and upon condition that the statements made by him in his application for membership in said commandery, and the statements certified by him to the medical examiner, both of which are filed in the office of the supreme keeper of records, be made a part of this contract, and upon condition that the said member complies in the future with the laws, rules and regulations now governing said commandery and fund, or hereafter enacted by the supreme commandery to govern said commandery and fund. These conditions being complied with, the supreme commandery hereby promises and binds itself to pay out of its benefit fund to Susie C. Hughes, wife, in accordance with and under the provisions of the law governing said benefit fund, and upon satisfactory evidence of the death of said member, and the surrender of this certificate, the sum of \$1,000.00, provided said benefit fund reaches the sum of \$2,000.00 at

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the assessment called in payment of this certificate, and, if said assessment shall not reach said sum of \$2,000.00, then there shall be paid on said certificate all or a proportional part of the fund received from the membership in one assessment." Appellant, in its answer, says that it was and is a secret fraternal order, and has lodges which were and are under the supervision of a grand supreme body, and said subordinate lodges acquire members therein through the lodge system, exclusively, pay no commissions, and employ no agents, except in the organization and supervision of the work of local subordinate lodges; admits that Francis M. Hughes was a member of the commandery located at Grahamville, Ky., and that the benefit certificate sued on was regularly issued to him in consideration of and upon the representation made by him in his application therefor; but denies any liability thereon, for the reason that he made numerous false and fraudulent representations in his application as to the condition of his health, to-wit, that he represented in said application that he had never been insane or predisposed to insanity; that he had never had, and was not predisposed to, spinal disease, when, as a matter of fact, he had been afflicted with the disease known as "spinal meningitis," which is a disease affecting the brain and spine; that he was in sound bodily health, whereas in fact his constitution and health had been seriously impaired; and that he made many other false answers to the questions propounded to him by the medical examiner touching the condition of his health, which are specifically recited, and which were material to the risk, and were relied on by the defendant in the issuance of its certificate. A copy of the petition, statements, and application are filed as exhibits with the answer. The trial court sustained a motion to strike from the defendant's

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answer all reference to representations made by the insured in his application for the benefit certificate, on the ground that neither the application, petition, nor medical examiner's certificate was attached to, accompanied, or was embraced in, the certificate of insurance, to which the defendant excepted. A general demurrer was then sustained to the answer, and, defendant declining to plead further, judgment was rendered thereon, and defendant appeals. And it is insisted that section 679 of the Kentucky Statutes, which requires that the application or charter and by-laws of the insurance company doing business under the laws of this State, or a copy thereof shall be attached to the policy before it can be treated as a part of the contract, or used in evidence on the trial of the case, has no application to secret fraternal orders, to which appellant belongs; that by sections 641 and 658 of the Kentucky Statutes, this class of insurance companies is expressly exempted from this and similar provisions of the insurance law.

Section 641 of the statutes is found under subdivision 1 of the article on "Insurance," and reads as follows: "The words, 'insurance company,' or 'insurance corporations,' as used in this article, shall be held to mean and include any association, individual, company, corporation, partnership, or joint stock company, engaged in or carrying on, in any manner, the business of insurance in this State, except that the provisions of this chapter or article shall not apply to secret or fraternal societies, lodges or councils, which are under the supervision of a grand or supreme body, and secure members through the lodge system exclusively, and pay no commission nor employ any agents, except in the organization and supervision of the work of the local lodges." The exemption in this section only refers to those

general provisions regulating insurance companies found in subdivision 1 of the insurance law. Section 658 is found under subdivision 2 of the insurance law, which treats of what are generally known as standard or old-line insurance companies, and exempts associations which do not guaranty a fixed amount of insurance on their policy contract, and do not charge a fixed premium for the performance of such contracts, from the provisions of the law applicable to the old-line insurance companies embraced in that subdivision. Appellant undoubtedly belongs to that class of life insurance companies treated of in subdivision 3, known as assessment or co-operative companies. Section 664, which falls under subdivision 3, provides: "Any corporation, association or society which issues any certificate, policy or other evidence of interest to, or makes any promise or agreement with, its members, whereby, upon the decease of a member, any money or other benefit, charity, relief or aid is to be paid, provided or rendered by such corporation, association or society, to the legal representative of such member or to the beneficiary designated by such member, which money, benefit, charity, relief or aid is derived from voluntary donations or to be collected from the member thereof, or the members of a class therein, and interest and accretions thereon, or rebates from amounts payable to the beneficiaries or heirs, and wherein the paying, providing or rendering of such money or other benefit, charity, relief or aid is conditioned upon same being realized in the manner aforesaid, and wherein the money or purposes of such corporation, association or society, and the expenses of the management and prosecution of its business, shall be deemed to be engaged in the business of life insurance upon the co-operative or assessment plan, and shall be subject only to the provisions of this sub-division." Section

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679 of the Kentucky Statutes is found among the provisions especially applicable to the co-operative or assessment life insurance companies, and we think unquestionably applies to the benefit certificate sued on in this case. In *Society v. Puryear's Adm'r*, 109 Ky., 381 (22 R., 980), (59 S. W., 15), it was held to apply also to policies issued by old-line companies; and in *Rice v. Rice's Adm'r* (23 R., 635), (63 S. W., 586) it was held that, in an action to recover on a policy of insurance, representations made therefor by the insured in his application form no part of the contract, and could not be considered in evidence. The court therefore properly struck out all the paragraphs of the answer which refer to or rely upon the representation made by the insured in his application for insurance, or the report of the medical examiner which accompanied same, and as the certificate only purports to have been issued upon representations made in the application, and there is no averment in the answer that any other form of representations were relied upon, the demurrer was properly sustained.

For reasons indicated, the judgment is affirmed.

Petition for rehearing by appellant overruled.

CASE 25—ACTION BY L. Y. BROWNING AGAINST THE CONTINENTAL INSURANCE COMPANY OF NEW YORK ON A POLICY OF FIRE INSURANCE.—DEC. 2.

Continental Insurance Co. of New York v. Browning.

114	183
120	774
114	183
137	268

APPEAL FROM SHELBY CIRCUIT COURT.

JUDGMENT FOR PLAINTIFF AND DEFENDANT APPEALS. AFFIRMED.

FIRE INSURANCE—FORFEITURE—DEFAULT IN PAYING PREMIUM—ESTOPPEL.

1. By the terms of a fire insurance policy, it was stipulated that the company should not be liable for any loss occurring while any part of the premiums was due and unpaid. The policy was a renewal of a similar policy, upon which the insured had been allowed to run over a few days in his payments, and at the time of the issuance of the new policy, the company's agent assured the insured that the company would see that the policy was kept alive if the premium was not paid for a few days after due. The note given for the first installment was held up a few days in pursuance of such agreement. In reliance on the promise, the insured did not leave his sick wife to pay a later premium when due, and two days later the house burned. *Held*, that the company was estopped from insisting on the forfeiture.

CLARENCE DALLAM, FOR APPELLANT.

WILLIS & WILLIS, FOR APPELLEE.

(No briefs.)

OPINION OF THE COURT BY JUDGE HOBSON—AFFIRMING.

Appellant issued to L. Y. Browning, on March 17, 1898, a policy insuring, among other things; his dwelling house for five years, in consideration of \$52, or \$13 a year. For the first installment a note was taken, due April 1, 1898, and for the other installments notes were given payable March 1st of each year. The house burned on March 3, 1900. The note due March 1st had not been paid, and the

company relied on this fact to defeat liability on the policy. It was stipulated in each of the notes, in the written application, and in the policy, that if any installment of the premium was not paid when due, the company should not be liable for any loss that occurred while such installment, or any part of it, remained due and unpaid. In avoidance of this defense the plaintiff pleaded and proved that he had held a similar policy on the same property before the one in suit was issued, and that it was taken out in renewal of the former policy; that during the continuance of the former policy he was not required to pay his notes promptly, but was allowed to run over a few days; that, when the renewal was applied for and the notes given, it was agreed between him and the district agent with whom the contract was made that he need not worry about meeting his payments promptly, and that the company would see that his policy was kept alive if his payment was behind a few days. The note which he gave for the first installment was not paid promptly, but a few days after it was due. The agent testified that he carried this as a personal matter, but this does not appear to have been communicated to appellee, or to have been his understanding. The payment for 1899 was made in due time. When the payment for 1900 fell due, appellee's wife was sick, and he did not like to leave her, and, relying on the promise of appellant, did not go from his home in the country to make the payment on that day. Two days later, and before he had gone to pay the note, although he had the money to pay it, the house burned. This was on Sunday, and the company refused to take the money on Monday. On these facts the court instructed the jury that if appellant agreed to keep the policy alive, or to save any forfeiture for his failure to pay any installment of the premium at maturity,

they should find for appellee. Under this instruction the jury found for him, and the propriety of this instruction is the only question that need be considered on the appeal, for the evidence warranted the finding of the jury under the instruction.

It is earnestly maintained by the appellant that the parol agreement made between the appellee and the agent at the time the contract was made was superseded by the written contract, and that it is not competent to impeach the writing by proof of a parol agreement as to the payment of premiums, contrary to its terms, made in the negotiations between the parties resulting in the written contract. There are many cases sustaining this contention. See 2 Joyce, Ins., secs. 1254-1256, and cases cited. But, while this is true, most of the cases are to the effect that the court will lay hold of slight circumstances showing that the insurer, by his subsequent conduct, has in fact misled the insured, or induced him to understand that prompt payment was not required to keep his policy alive; and in *Blackerby v. Ins. Co.*, 83 Ky., 574, 7 R., 633, which was a suit on a policy just like the one before us, issued by appellant, the court said that the policy will not be regarded as forfeited if "the insured can show some reasonable excuse for nonpayment of the premium, based upon the conduct of the insurer." This rule has been followed in many subsequent cases. See *Insurance Co. v. Mears*, 105 Ky., 323 (20 R., 1217), (49 S. W., 31); *Mudd v. Insurance Co.* (22 R., 308), 53 S. W., 977, and cases cited. The reason of the rule is that the prompt payment of the money may be waived by the creditor, and if he, by his words or conduct, has led the debtor to believe that prompt payment is not required, he can not be allowed to insist on a forfeiture of the policy for a default in payment which he himself in-

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duced the debtor to make. In the case before us the company, by its course of business under the original policy, had led the assured to believe that prompt payment was not required to keep his policy alive, and when a renewal was had, he was, in terms, assured of this, and, after the new policy was issued, the agreement so made was carried out, and the note maturing April 1st was held up a few days, pursuant to the agreement. This was sufficient to entitle appellee to understand that the agreement would be similarly kept as to the installments subsequently maturing, and, as there was no notice to appellee of a change of purpose on its part, appellant can not be allowed to insist on a forfeiture of the policy when its own conduct and assurances warranted appellee in the course he followed. *Dunn v. Insurance Co.*, 69 N. H., 224, 39 Atl., 1075; *Alexander v. Insurance Co.*, 67 Wis., 422, 30 N. W., 727, 58 Am. Rep., 869.

Judgment affirmed.

CASE 26—ACTION BY NANNIE O'HALORAN V. CITY OF HENDERSON FOR DAMAGES FOR CONTRACTING SMALLPOX FROM CITY PEST-HOUSE—DEC. 2.

City of Henderson v. O'Halaran.

APPEAL FROM HENDERSON CIRCUIT COURT.

JUGMENT FOR PLAINTIFF AND DEFENDANT APPEALS. AFFIRMED.—

MUNICIPAL CORPORATIONS—PEST-HOUSE UNLAWFULLY MAINTAINED—INFECTION THEREFROM—PROXIMATE CAUSE—LIABILITY OF CITY—CONTRIBUTORY NEGLIGENCE.

1. Where a pest-house is maintained by a city, within a mile of the city limits, from which a member of a family nearby contracts smallpox, one who becomes a guest of the family for

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a day and contracts the disease from the family, without knowledge of the infection at the pest-house or in the family, and which at the time was not known by the family to be smallpox, may recover damages therefor from the city; the location of the pest-house being held to be the proximate cause of the injury.

2. The fact that the visitor discovered that a child with whom she slept during her visit had an eruption which she was told by the mother was chicken-pox, will not render the visitor guilty of contributory negligence so as to defeat her right to a recovery.

JNO. F. LOCKETT AND CLAY & CLAY, FOR APPELLANT.

1. We submit that the plaintiff, being an adult, was guilty of the grossest contributory negligence in sleeping with a child supposed to have chicken-pox, which is itself an eruptive and contagious disease.

2. Even if sleeping with the child in the same bed, infected with what was thought to be chicken-pox, but which was in reality smallpox be not sufficient to bar a recovery, we submit that the city is not liable because of the maxim, "*Causa proxima non remota spectatur.*"

The city had no control over the family of Mrs. Clayton, where appellee was visiting, and did not know that the disease was there, and could not reasonably foresee that she would visit a house and sleep with a child infected with an eruptive disease. None of these things came about or followed as a natural result of the location of the pest-house at that place, but they were all independent acts and but for which appellee would never have had the disease.

Jones' Admr. v. L. & N. R. R. Co., 82 Ky., 615; 1 Thompson on Negligence (2d ed.) sec. 49.

MONTGOMERY MERRITT, FOR APPELLEE.

1. By agreement, this case was held in abatement to await the result of the case of the City of Henderson v. Mrs. P. J. Clayton (22 R., 283-57 S. W., 1) in this court, and the city, being held liable to Mrs. Clayton, it is necessarily liable to Miss O'Halaran, who was on a visit to Mrs. Clayton, not knowing that any one at the city hospital had the smallpox. The city had authorized the Board of Health to send smallpox patients to the city hospital.

2. Proximate Damages.—The rule laid down in 82 Ky., 437, is: "Whoever does an illegal or wrongful act is answerable for all the consequences that ensue in the ordinary and natural course of events, even though these consequences be brought

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about by the intervening agency of others, provided the intervening agents were set in motion by the primary wrong-doer, or provided those acts causing the damage were the necessary or legal and natural consequences of the original act.

Sutherland on Damages, vol. 1, secs. 16 to 40.

OPINION OF THE COURT BY JUDGE HOBSON—AFFIRMING.

The city of Henderson established a pesthouse within one mile of the city boundary, by reason of which the disease of smallpox was communicated to the family of Mrs. Clayton, who lived near by. It was held that the city was liable to her in damages. *City of Henderson v. Clayton*, 22 R., 283, 57 S. W., 1. The appellee, Nannie O'Halaran, was a guest at Mrs. Clayton's house, and contracted the disease while there. This is a suit by her for damages against the city. The agreed facts are: About two weeks after the first case of smallpox had been sent to the pesthouse—a fact unknown to appellee—she came to Henderson from her home in the country, and at Mrs. Clayton's invitation went to her house, and spent the night. Upon reaching the house, she found Mrs. Clayton's little boy broken out with some eruption, and asked his mother what was the matter with him. His mother answered that she supposed it was chicken pox. Appellee did not know, and no one else then knew, the child had smallpox. She slept in the same bed with him that night, and returned home the next day. The same day a physician was summoned, and pronounced the breaking out on the child smallpox. In due course of time appellee was stricken with the disease at her home, and was confined to her room about three weeks. Her person was considerably pitted with pockmarks, and she was at expense for nursing and physicians. The pesthouse was located 300 yards from the boundary line of the city, and 250 yards from Mrs. Clayton's house, where appellee contract-

ed the disease. It is agreed as a fact that the pesthouse was maintained by the city authorities, that Perry Clayton contracted the disease from the pesthouse, and that appellee contracted it from him. On these facts the case was submitted to the court without a jury, and he entered a judgment in favor of the appellee for \$500.

It is earnestly maintained that the damages sued for are not the proximate or natural result of the defendant's wrong, and that the plaintiff was herself guilty of contributory negligence. In discussing the rule that the proximate cause is not always the nearest agency in time or space within the rule that the law regards the proximate, and not the remote, cause, in 1 Thomp. Neg., sec. 48, it is said that: "The law does not consider the cause or causes beyond seeking the efficient, predominant cause, which, following it no farther than those consequences that might have been anticipated as not unlikely to result from it, has produced the effect. But at the same time no act is deemed in law to contribute to an injury unless it is near to that injury in the order of causation. This is what is meant by the expression 'proximate cause.' But the nearest—in point of time or space—may not be the responsible agency at all. Thus, A. negligently drives on a public street, and thereby comes into collision with the carriage of B. This causes the horses of B. to take fright, and run away, injuring C. Here both reason and justice require that A. should pay damages to C., and it would be against reason and justice to visit the consequences of the catastrophe upon B., who is the innocent intermediary in the causes. S., a wholesale druggist carelessly put belladonna, a deadly poison, in a package, and labeled it 'extract of dandelion,' a harmless medicine, and sent it, so labeled, into the market. After passing through the hands of several innocent persons, it

was purchased by an apothecary, and administered to the plaintiff's wife, on the faith of the false label, injuring her. Here the negligence of the original vendor was deemed the proximate cause of the injury, and the plaintiff had an action against him. It would have been manifestly unjust to visit the consequences of the mistake upon the last apothecary selling the substance, since he had acted innocently, and without negligence. His act, though nearest in point of time, was not nearest in the line of causation. So, where a fire is negligently set out, and travels without interruption to the property of plaintiff, destroying it, the original negligence of setting it out is deemed in law the proximate cause of the plaintiff's damage, although the immediate cause may have been back fires ineffectually set to arrest the main fire, the same being swallowed up in its advance. So, where a father, mother, and son were crossing a bridge, in the railing of which an opening had been negligently left, through which the son fell into the water beneath, and the father plunged in after him to save him, and both were drowned, it was held that the mother might recover damages from the State for the death of the father; for, though the peril of the child was the nearest procuring cause of the action of the father in point of time, yet the negligence of the State in leaving the bridge in a dangerous condition was the *causa causans*—the proximate cause, which the law would regard. Much the same rule was applied where the plaintiff's intestate lost his own life in endeavoring to save the life of a child on a railroad track. So, where the defendant had ascended in a balloon, which descended a short distance from the place of ascent, in the plaintiff's garden, and the defendant, being entangled and in a perilous situation, called for help, whereupon a crowd of people broke through plaintiff's fence into his garden,

and trod down his vegetables and flowers, it was held that, although ascending in the balloon was not an unlawful act, yet, as the defendant's descent, under the circumstances, would ordinarily draw the crowd into the garden, either from a desire to assist him or to gratify curiosity which he had excited, he was answerable in trespass for all the damages done to the garden of the plaintiff. Nevertheless, it appeared that in point of time the act of the defendant was not so near the injury as that of the crowd." Summing up the authorities, in section 59, he says: "In other words, it is not necessary to a defendant's liability after his negligence has been established, to show, in addition thereto, that the consequences of his negligence could have been foreseen by him. It is sufficient that the injuries are the natural, though not the necessary and inevitable, result of the negligent fault—such injuries as are likely, in ordinary circumstances, to ensue from the act or omission in question." To such effect, see Bish. Noncont. Law, secs. 45, 46; Davis v. Railway Co. (24 R., 135), 68 S. W., 140; 1 Sedg. Dam., secs. 128, 129. In section 131 of the latter work it is said: "Where animals sold have an infectious disease known to the seller, but not to the purchaser, which is communicated to other animals of the purchaser, the latter may recover compensation for the damage done to his other animals. The same rule applies where the defendant's sheep trespass on the plaintiff's land and communicate disease. And where the defendant's rams trespassed on the plaintiff's land, and got his ewes with lamb out of season, so that the lambs died soon after birth, the plaintiff was allowed to recover the diminution in value for the ewes for breeding and other purposes." In the Clayton case we held that Mrs. Clayton, who took the smallpox from her child, might recover damages therefor on the

ground that the purpose of the statute in forbidding the pesthouse being put within one mile of the city boundary was to prevent the communication of contagious diseases to other persons from the pesthouse, and that it was the natural result that the mother should take the disease from the children living in the family with her. It is just as natural, and to be as reasonably expected, that other persons who were members of the family, whether temporarily or permanently, would take the disease. If appellee had been cooking for Mrs. Clayton, whether by day, week or month, and while cooking there had contracted the disease, which had been brought there from the pesthouse, plainly such a result would be no more remote than Mrs. Clayton's contracting the disease; and no sound distinction can be made between a person who lived in the house for twenty-four hours and one living there longer, if they both took the smallpox while there. The guest was a member of the family as much as the servant would be. And while it was not to be anticipated, perhaps, that a particular person would visit at this house at this time or would be engaged there as a domestic, or be there for any other reason, still it was to be anticipated that persons would come there for various purposes, and the communication of the disease from the persons living in the house to these persons is a result as naturally to be expected as its communication from one member of the family to another. The purpose of the statute is to require the persons having the contagion of these diseases separated from the rest of the community, so as to prevent the spread of the disease. It was a result naturally to be expected when the statute was violated that the disease would be communicated to the persons living in the neighborhood, and that not only regular members of the family would take it but also those

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who might, for any reason, for the time, be living with them. We therefore conclude that the damages to appellee are not too remote to be recovered for.

On the question of contributory negligence it is conceded that appellee did not know there was any smallpox at the pesthouse, and nothing was shown to justify apprehension on her part that the eruption on the little boy was of a more serious character than his mother supposed.

Judgment affirmed.

Judges DuRelle and Paynter dissent.

CASE 27—ACTION BY THE FIRST NATIONAL BANK OF LOUISVILLE V.
J. L. HACKETT ON A NOTE.—DEC. 2.

Hackett v. First National Bank of Louisville.

APPEAL FROM JEFFERSON CIRCUIT COURT, COMMON PLEAS DIVISION.

JUDGMENT FOR PLAINTIFF AND DEFENDANT APPEALS. AFFIRMED.

BILLS AND NOTES—LEAVING BLANK SPACE THEREIN—ALTERATION BY
MAKER—LIABILITY OF SURETY.

One who signs a note as surety in which are written the words, "five hundred," with spaces before and after them, which the maker fills up by writing "twenty" before and "fifty" after them, thereby making a note for \$2,550, is liable thereon to a bona fide purchaser.

GIBSON, MARSHALL & GIBSON, FOR APPELLANT.

POINTS AND AUTHORITIES.

1. The maker of an incomplete instrument—one with blank spaces in which *nothing* is written—will not, as a general rule, be released because of alterations made by filling these blank spaces; but if each space is utilized for its proper purpose, though not entirely filled, it is a *complete instrument*, and any

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material alteration caused by inserting other words in the unfilled part of the space releases the maker, even against an innocent holder, though the alteration can not be detected on the closest scrutiny.

Daniel on Neg. Instru., 1404-7a and 8; Randolph on Com. Paper, sec. 1754; Bigelow on Bills, Notes and Cheques, 218; Woods' Byles on Notes, 323; Thompson on Trials, 296; Greenfield Sav. Bk. v. Stowell, 123 Mass., 196; Holmes v. Trumper, 22 Mich., 427; Wade v. Withington, 1 Allen (Mass.) 561; McGrath v. Clark, 56 N. Y., 34; Burrows v. Klunk, 70 Md., 371; Exchange Nat. Bk. v. Bank of Little Rock, 58 Fed. Rep., 141. Knoxville Nat. Bk. v. Clark, 51 Iowa, 264; Wood v. Steele, 6 Wallace, 80; Fordyce v. Kosminski 49 Ark., 40; Searles v. Seipp, S. Dak., S. C., 61 N. W., 804; Worrall v. Gheen, 39 Pa. St., 388; Simmons v. Atkinson & L. Co., Miss., 12 So., 263.

2. The preceding proposition presents a question which is an open one in this State, it never having been presented to this court for decision. The cases of Bank of Commerce v. Halderman, 22 Ky. L. Rep., 719, and Blakey v. Johnson, 13 Bush, 204, decide the question, but in each case the court distinctly declared that the question was not presented. In Blakey v. Johnson, which is cited to support the dictum in the other case, the court distinctly said that the question which it decided and on which it affirmed the case was not presented by the pleadings or the evidence, or submitted to the jury or argued by counsel.

3. The general rule applied in cases where one of two innocent parties must suffer has no application to a case where a complete note has been so carelessly executed as to allow alterations to be made that can not be detected on careful scrutiny and has passed into the hands of an innocent holder. The crime of the forger, and not the negligence of the maker is the proximate cause of the loss.

McGrath v. Clark, 56 N. Y., 34; Knoxville Nat. Bank v. Clark, 51 Iowa, 264; Wood v. Steele, 6 Wall., 80; Fordyce v. Kosminski, 49 Ark., 40; Goodman v. Eastman, 4 N. H., 455; Jones v. Bangs, 40 Ohio St., 139; Bruce v. Westcott, 3 Barb., 378; Scholfield v. Earl of Londesborough, A. C., 514; Burrows v. Klunk, 70 Md., 451; Worrall v. Gheen, 39 Pa. St., 388; Holmes v. Trumper, 22 Mich., 427.

4. When a complete note, executed on a printed form, with every blank space utilized for its proper purpose, is altered by inserting other words so as to raise the amount, and the holder seeks to avoid the effect of the alteration by alleging that the note was so negligently executed as to admit of the alteration

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without detection, and the maker denies such negligence, an issue of fact is formed which should be submitted to the jury. *Brown v. Reed*, 79 Penn. St., 370; *Leas v. Walls*, 110 Penn. St., 57; *Beaman v. Russell*, 20 Vermont, 205; *Printup v. Mitchell*, 17 Ga., 553; *Reed v. Kemp*, 16 Ill., 449; *Gillett v. Sweat*, 1 Gil. R., 489; *Iron Mountain Bank v. Murdock*, 62 Mo., 70; *Haskell v. Champion*, 30 Mo., 138; *Bruce v. Westcott*, 3 Barb., 378.

5 Peremptory instructions are ordinarily granted only against a party having the burden, who fails to produce any evidence tending to sustain the issue. They are never granted in favor of a party having the burden unless the issue is fully sustained by documentary evidence alone. *Ellis v. Schlenker*, 11 Ky. Law Rep., 999; *Perry v. Reding*, 9 Ky. Law Rep., 536.

HELM, BRUCE & HELM, FOR APPELLER.

HENRY L. STONE, LEOPOLD & PENNEBAKER, OF COUNSEL.

POINTS AND AUTHORITIES.

1. Where a person signs a note so prepared that ample blank space is left to permit of an easy alteration without there being any appearances of alteration, so that the attention of an ordinarily prudent business man is not attracted to it, the loss must fall upon the person thus carelessly signing the note, and not upon a *bona fide* purchaser for value, of the note. *Woolfolk v. Bank of America*, 10 Bush, 517; *Blakey v. Johnson*, 13 Bush, 199; *Newell v. First National Bank of Somerset*, 13 Ky. Law Rep., 773; *Bank of Commerce v. Haldeman* (Ky.), 58 S. W., 587; *Daniel on Negotiable Instruments*, sec. 1405; *Garrard v. Hadden*, 67 Pa. St., 82; *Zimmerman v. Rote*, 75 Pa. St., 188; *Brown v. Reed*, 79 Pa. St., 370; *Isnard v. Torres*, 10 La. Ann., 103; *Capital Bank v. Armstrong*, 62 Mo., 59; *Young v. Smith*, 63 Ill., 321; *Harvey v. Smith*, 55 Ill., 224; *Seibel v. Vaughn*, 39 Ill., 260; *Young v. Lehman*, 63 Ala., 519.

2. Wherever the courts of a State have rendered decisions which must necessarily affect the conduct of business in the State, and upon the faith of which the business has been presumptively conducted, the principle of *stare decisis* is particularly applicable, and in such cases it is better that the rule should be well understood than that it should be in accord with what the court may at a later date think better reasoning. *South's Heirs v. Thomas' Heirs*, 7 Mon., 62; *Tribble v. Taul*, 7 Mon., 456.

3. As the conclusion of negligence necessarily results from the fact of leaving ample blank space to make an alteration in the note without affecting its appearance, it would be idle

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for the court to leave to the jury to determine whether ample space had been left when it was perfectly certain from an examination of the note itself that ample space had been left. In such a case it is not only the province but the duty of the court to decide this question itself as a question of law. *Woolfolk v. Bank of America*, 10 Bush, 517.

OPINION OF THE COURT BY JUDGE HOBSON—AFFIRMING.

Joseph Clark applied to the appellant, J. L. Hackett, to go his surety on a note for \$500, payable at the American National Bank of Louisville, Ky. Hackett agreed to do so, and signed the note drawn by Clark for \$500, but there was a space left in the note before the words "five hundred" and after them, and Clark filled up the first space with the word "twenty" and the other with the words "and fifty," so as to make the note read as one for \$2,550. There was nothing on the face of the instrument to indicate the alteration, and Clark then discounted the note in this condition to appellee, the First National Bank, of Louisville, who paid him the money on it without notice of its infirmity. The facts being undisputed, the court properly held that there was nothing to submit to the jury, as simply a question of law was raised as to the legal effect of the conceded facts. It is argued that there was enough on the face of the note to put the bank on notice, but, after a careful examination of the instrument, we are of opinion that this position can not be maintained. In *Blakey v. Johnson*, 13 Bush, 197 (26 Am. Rep., 254), it was held, following *Woolfolk v. Bank*, 10 Bush, 514, that where the drawer of a bill of exchange or the maker of a negotiable note has himself, by careless execution of the instrument, left room for insertion to be made without exciting suspicions of a careful man, he will be liable upon it to a bona fide holder without notice, when the opportunity which he afforded has been embraced, and the instrument filled up with a larger

amount than it bore when he signed it, on the principle that he invited the public to receive it; and should bear the loss, rather than an innocent purchaser. This case was approved in *Newell v. Bank*, 12 Ky. Law Rep., 775, and in *Bank v. Haldeman*, 109 Ky., 222 (22 R., 717), (58 S. W., 587) as stating the rule of law correctly. Although the question here raised was not presented in either of these cases they at least evidence the acquiescence of the court in the rule that had been laid down. It is earnestly argued for appellant that the great weight of authority is the other way, and that these cases should be overruled. It is also urged that the question was really not presented in *Blakey v. Johnson*, but in fact the judgment turns on this question alone, and no other was discussed by the court. The rule so declared is sustained by cases in Pennsylvania, Illinois, Missouri, Louisiana and Alabama. *Brown v. Reed*, 79 Pa., 370 (21 Am. Rep., 75); *Yocum v. Smith*, 63 Ill., 321 (14 Am. Rep., 120); *Bank v. Armstrong*, 62 Mo., 59; *Isnard v. Torres*, 10 La. Ann., 103; *Young v. Lehman, Durr & Co.*, 62 Ala., 519. The decision has remained the law of the State for a quarter of a century. In the meantime business has been readjusted to it, and under the principle of *stare decisis*, we do not think it ought now to be departed from, for in matters of this kind it is not so important that the law should be rightly settled as that it should remain stable after it is settled; and, as has been well said, "attempts to change the course of judicial decisions under the pretext of correcting errors are like experiments by the quack on the human body. They constantly harass, and often jeopardize it." *South's Heirs v. Thomas' Heirs*, 23 Ky., 63. Again, in *Tribble v. Taul*, 23 Ky., 456, the court after stating the same rule said: "In the supreme court of a State, as this is, possessing with but few exceptions ap-

pellate judicial power coextensive with the State, the influence which its decisions must have is evident. Its mandates are conclusive, and even its *dicta* are attended to in all the inferior courts. No sooner is a decision published than it operates as a pattern and standard in all other tribunals and as a matter of course, all other decisions conform to it. If, in this court, a settled course of adjudication is overturned, then the trouble and confusion of reversing former causes succeeds in the inferior tribunals; and even the credit and respect due to this court is shaken by the phenomenon that A. has lost his cause on the same ground that B. gains his. And not only do these consequences follow, but some still more serious may ensue; for perhaps no court may strike the vitals of society with a deeper wound than a capricious departure in this court from one of its established adjudications." Under the rule which, for a quarter of a century, has been recognized, it has not been necessary in this State for a purchaser of such paper, which is fair on its face, to make inquiry as to its validity before buying it, and much business has been done on this basis. In other jurisdictions, where the opposite rule prevails, the practice has been different, and it would be manifestly a violation of the principle on which the doctrine of *star decisio* rests, for this court, after the business of the State has adjusted itself to the rule which it has laid down, now to reverse itself, and lay down the opposite rule. Besides, the rule so declared seems in keeping with the spirit and purpose of our statute regulating paper of this character. Section 19 of the Civil Code of Practice as follows: "In the case of an assignment of a thing in action, the action by the assignee is without prejudice to any discount, set-off or defense now allowed; and if the assignment be not authorized by statute the assignor must be a party, as plaintiff or defendant. This section

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does not apply to bills of exchange, nor to promissory notes placed upon the footing of bills of exchange, nor to common orders or checks." It will thus be seen that bills of exchange, promissory notes placed upon the footing of bills of exchange, and common orders or checks are placed upon a peculiar footing. The reason for this is that a large part of the business of the commercial world is done through bills of exchange, bank checks, and notes placed upon the footing of bills of exchange, which pass from hand to hand in many transactions, serving as a substitute for money; and to promote this such paper in the hands of a *bona fide* purchaser is held free from defenses which might have been made between the original parties. By section 483, Kentucky Statutes, promissory notes, payable to any person or corporation, and payable and negotiable at any bank incorporated under the laws of this State or organized in this State under the laws of the United States, which shall be indorsed to and discounted by the bank at which the same is payable, or by any of the other banks above specified, are thereby placed on the footing of foreign bills of exchange. The note in question was placed on the footing of a bill of exchange. It was executed for the purpose of raising money. The purpose of the Statute is to promote negotiations of paper of this character to facilitate commercial transactions and obviate the necessity of the use of currency. It is in keeping with the purpose of the statute that he who puts out paper which is to pass in this way in commercial transactions should exercise due care, for it is necessarily intended to be used in raising money; and the fair effect of the statute would be defeated if a defense such as that here made were allowed against the paper in the hands of a *bona fide* holder.

Judgment affirmed.

Chief Justice Guffy dissents.

CASE 28—ELECTION CONTEST BY J. T. FARMER AGAINST JOHN C. HERN-
DON FOR JUSTICE OF THE PEACE—DEC. 3.

Herndon v. Farmer.

APPEAL FROM FAYETTE CIRCUIT COURT.

JUDGMENT FOR CONTESTANT AND CONTESTEE APPEALS. AFFIRMED.

ELECTIONS—MARKING BALLOTS—DISTINGUISHING MARKS—JURISDIC-
TION OF CIRCUIT COURTS IN ELECTION CONTESTS.

- Held: 1. The election law of October 16, 1900, does not repeal that part of section 1471, Kentucky Statutes, prescribing the method of voting except in so far as the act of 1900 provides for voting by stamping in a circle under the device in lieu of stamping in the square in which the device is printed; said acts being otherwise not in conflict as to the method of voting.
2. Kentucky Statutes, sec. 1471, providing that "no ballot shall be rejected for any technical error which does not make it impossible to determine the voter's choice," and there being no statute forbidding or providing for the rejection of a ballot stamped in the circle under two devices, where a ballot is marked in the circle under two devices, under one of which are candidates for several offices, and under the other only a candidate for one office, the ballots will be counted for the candidates under the first device for other offices than that of the candidate under the second device, such marking not being so placed as a distinguishing mark within the meaning of section 1476, Kentucky Statutes, but apparently made in good faith.
3. The Act of 1898 to "further regulate elections." and the acts of October 16 and October 24, 1900 "to further regulate elections," having heretofore been decided not to be in conflict with section 51 of the Kentucky Constitution, providing that no law enacted by the General Assembly shall relate to more than one subject, etc., the court is not disposed to reopen that question, and therefore, under these acts the circuit court has jurisdiction to try election contests.

MAURY KEMPER AND C. J. BRONSTON, FOR APPELLANT.

SYNOPSIS OF ARGUMENT AND AUTHORITIES.

1. The Fayette circuit court is without jurisdiction of this

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114 451

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case because the election law of 1900 conferring jurisdiction upon such court is unconstitutional. *Purnell v. Mann*, 20 Ky. Law Rep., 1146; *Pratt v. Breckinridge*, 23 Ky. Law Rep., 1357; sec. 51, Kentucky Constitution; *Purnell v. Mann*, 20 Ky. Law Rep., 1396 (Dissenting Opinion of Judge Guffy); *Stewart v. Rose*, 24 Ky. Law Rep., 347.

2. This case should be reversed because voting under two devices is contrary to and prohibited by the election laws of Kentucky. The following cases *fully* sustain this contention: Sec. 1471, Kentucky Statutes; *State v. Ingersoll*, 17 Wis., 654; *Whittam v. Zahorig*, 91 Iowa, 37; *Lay v. Parsons*, 104 Cal., 662; *Parvin v. Winberg*, 130 Ind., 566; *McKittner v. Pardee*, 8 South Dakota, 44; *Hope v. Flentge*, 140 Mo., 399; *Barrett's Appeal*, 116 Penn. State, R., 488.

J. D. & G. R. HUNT, R. A. THORNTON AND FALCONER & FALCONER, FOR APPELLEE.

PROPOSITIONS DISCUSSED AND AUTHORITIES CITED.

1. The Fayette circuit court has jurisdiction to try a contest for the office of magistrate, where the contestant and contestee both reside in Fayette county, under the provisions of chapter 5, section 12 of the Acts of 1900. *Stewart v. Rose*, 24 Ky. Law Rep., 347.

2. Whenever the intention of the voter can be ascertained from the ballot, the same should be counted in accordance therewith. Sec. 1471, Kentucky Statutes.

3. We further contend that if the Act of 1892 is invalid in so far as it confers jurisdiction on the county boards and if the Act of 1900 does not confer any jurisdiction on the circuit court, then there is no provision for the trial of contested elections. In this case we hold that the circuit court has jurisdiction, independent of any other statute, under the provisions of section 966 of the Kentucky Statutes.

4. In determining how the ballots should be counted and in support of our contention in our original brief, we would refer to the recent cases of *Pettit v. Yewell*, 24 Ky. Law Rep., 566, and *Parker v. Orr*, 158 Ill., 609 (S. C. 30 L. R. A., 227); See also *In re Middendorf*, 4 Pa. Dist. R., 78; *Reed v. McArthur*, 15 P. Co. Ch. R., 136; 3 Pa. Dist. R., 682.

OPINION OF THE COURT BY JUDGE DURELLE—AFFIRMING.

Appellant, Herndon, and appellee, Farmer, were the Democratic and Republican candidates for the office of justice of the peace in the Fourth magisterial district of Fayette

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county at the election held in November, 1901. Their names were regularly placed upon the official ballot under the Democratic and Republican devices, respectively, and they were voted for at said election. Upon the official ballots there was a Democratic ticket under the party device of the chicken cock, with the candidates for each office to be filled at the election. There was a Republican ticket under the party device of the log cabin, containing a list of candidates for a number of the offices to be filled, but without a candidate for the office of county court clerk. There was also an independent candidate for the office of county court clerk, whose name appeared in a separate column under his own device, viz., a likeness of himself. Under the device of each of the two parties, and also under the device of Claude Chinn, the independent candidate for county court clerk, there was a circle. Below the circle under Chinn's picture was the printed title of the office for which he was a candidate, and below that his name, with a small square to the right of it, and below that a blank space, with a small square to the right of it. The vote in all the precincts is admitted to have been correctly counted by the election commissioners, with the exception of 70 disputed and questioned ballots, which were not counted by the officers of election or by the election commissioners. The vote as tabulated by the election commissioners showed a majority of 12 votes in favor of Herndon. Some question was made as to the mode of preservation of 20 of the disputed and questioned ballots, but it is not material to consider it, as the disputed ballots from the other precincts, if counted, would give the election to Farmer, and the counting of the remaining 20 disputed ballots would only increase his majority. Sixty-two of the 70 questioned ballots are plainly marked with the stencil in the circle un-

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der the log cabin, and in the circle under Claude Chinn's picture. The other 8 are plainly marked in the circle under the chicken cock, and in the circle under Claude Chinn's picture. If these ballots are counted in the race for magistrate, they change the result from a majority of 12 for Herndon to a majority of 42 for Farmer. The commissioners refused to count them. Upon a contest being instituted, the circuit court counted the disputed ballots, and awarded the election to Farmer. From that judgment Herndon has appealed, and urges two grounds for reversal: (1) That the ballots marked with the stencil in the circle under either the Democratic or Republican device, and also marked with the stencil in the circle under the device of Claude Chinn, the independent candidate for county court clerk, can not be counted for any one; and (2) that the Fayette circuit court had no jurisdiction of this contest. Counsel for appellant concedes that the purpose of the voter in thus stamping his ballot is perfectly apparent, but this purpose has not been legally expressed, and must be disregarded.

Appellant claims that section 1471, Kentucky Statutes, makes provision for the method of voting for a list of candidates upon the same ticket, and at the same time voting for an individual upon another ticket; that this method is clearly defined, and, to accomplish the desired result, the voter must vote in the circle under the device of the list or ticket of candidates for whom he desires to vote, and also in the little square provided by law after the name of the person for whom he desires to vote upon the other ticket; that the marks made by the voters upon the ballots here in question are in utter disregard of the statutory method, and for that reason can not be counted for any candidate of any party; and that it was never intended by

the Legislature that a voter could cast his vote and have it counted, if he marked it in the circle under two party devices. He also claims that all of that part of section 1471, Kentucky Statutes, which is not re-enacted in section 4 of the act of October 16, 1900, "to further regulate elections," is repealed by the latter act, under the doctrine in *Broadbuss' Devisees v. Broadbuss' Heirs*, 10 Bush, 309. In the recently decided case of *Pettit v. Yewell* (24 R., 565) 68 S. W., 1075, in an opinion by Judge Paynter, it was held: "There was nothing in the act which is in conflict with that part of section 1471 which provides that no ballots shall be rejected for any technical error which does not make it impossible to determine the voter's choice."

On behalf of appellee it is maintained that in the act of October 16, 1900, there is nothing in conflict with that part of section 1471 which prescribes the method of voting, except in so far as the latter act provides for voting by stamping the stencil in a circle under the device, in lieu of stamping the stencil in the square in which the device was printed under the former statute. This seems necessarily to follow from the decision in *Pettit v. Yewell*. Moreover, if the new act repeals all the provisions of section 1471 not set forth and re-enacted, there would remain no provision for the clerk taking the name and residence of the voter, for his marking it on the secondary stub, for his detaching and furnishing a ballot to the voter, for his explaining the method of voting, or for the elector to retire alone to one of the booths.

Appellee further argues that section 1471 provides two methods of voting, either of which may be adopted by the voter if he so desires: First, it is provided that on receipt of his ballot the elector shall retire alone to one of the booths, "and shall prepare his ballot by marking in the

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appropriate square a cross-mark immediately following the name of the candidate of his choice for such office to be filled, and in case of a question submitted to the vote of the people by marking in the appropriate square a cross-mark against the answer which he desires to give." We have no doubt, and counsel for appellant concedes in argument, that this mode of voting is still proper—that the elector may vote for every candidate upon one ticket by stamping in the square to the right of each name, or that he may in like manner vote for all the candidates, except one, upon one ticket, and for the candidate for the omitted office upon another ticket, by stamping in the squares following the names of such candidates upon the two tickets. There is equally little doubt that if he votes by stamping in the squares following all the names upon one ticket, and in the square following the name of one candidate upon another ticket, his vote must be counted for all the candidates opposite whose names he placed his mark except for the two candidates for whom he voted for the same office. This is so according to the statute, which provides further on in the section that "if the elector marks more names than there are persons to be elected to an office, or if for any reason it is impossible to determine the voter's choice for the office to be filled, his ballot shall not be counted for such office." This method is called by appellee and is, the "primary mode of voting provided by the statute." But the statute provides a secondary mode of voting, and it is for this method that the devices are provided. This has been altered by the new act solely by substituting a stamp in the circle under the device for a stamp in the square with the device. In the new act it reads: "Should any elector desire to vote for each and every candidate of one party, he shall make a cross-mark in the circle under the device

of said party, and the vote shall be counted for all the candidates under said device." This appellee calls the "secondary mode of voting." It is not exclusive of the primary mode, and has never been so regarded. The statutory provision for this secondary method of voting has appended to it a proviso as follows: "Provided, however, if a cross-mark (X) be made in the circle under a party device and a cross-mark (X) be also made after one or more candidates of a different party, or parties, the vote shall be counted for the candidates so marked, and not for the candidates for the same offices of the party so marked, but the vote shall be counted for the other candidates of said party." This proviso imposes no additional obligation on the voter. It does not require him to vote in the manner thus indicated. It is not even permissive. It does not say that he may vote in this manner. It says only that if he does vote in this mode, his vote shall be counted, and how it shall be counted. There is no statutory provision anywhere, in any of the election statutes, forbidding the marking of a ballot in the circle under two devices, or providing for the rejection of any so marked. On the contrary, even where the voter marks more names than there are persons to be elected to an office, the statute annuls his ballot only with respect to that particular office, and leaves it valid as to all other offices as to which he indicated his intention. And it provides further, "No ballot shall be rejected for any technical error which does not make it impossible to determine the voter's choice." If, therefore, the voter's choice can be determined, there is nothing in the statute to prevent these ballots having effect, unless these marks be construed to be distinguishing marks, within the meaning of section 1476. But in the case of *Houston v. Steele* (98 Ky., 596) (17 R., 1149) (34 S. W., 6),

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we held, in substance, and in *Graham v. Graham*, 24 R., 548 (68 S. W., 1094), specifically, that marks made upon a ballot in good faith were not distinguishing marks, because "not placed upon them for that purpose." It was upon this view that, in spite of the statutory requirement that "all marking upon the ballots shall be made with black ink stencil," we held in *Houston v. Steele*, and in the *Graham* case, that marks made with a black lead pencil, or even with a red one, or with blurred cross-marks, or with the butt end of the stencil, should be counted, if the voter's intent could be deduced therefrom. In the case at bar it is not necessary to decide, and we do not decide, what effect the placing of the stamp in the circle under the device of Chinn, the independent candidate for county court clerk, should have as to that office. Whether it had the effect of cancelling the ballot so far as that office was concerned, even though there was no candidate for such office upon the ticket under whose device the voter stamped, is not necessary to be decided. What we decide is that there is no technical error in the marking of this ballot which makes it impossible to determine the voter's choice for magistrate. That choice was perfectly evident, and the circuit court correctly so held.

The other question, and which was most elaborately and ably argued by counsel for appellant, is as to the jurisdiction of the circuit court in election contests. With great ability and force it is urged that the act of 1898 "to further regulate elections," the act of October 16, 1900, "to further regulate elections," and the act of October 24, 1900, "to amend an act entitled, 'An act to further regulate elections,' which became a law March 11, 1898, the objections of the governor to the contrary notwithstanding," are all invalid under section 51 of the Constitution, providing that

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"no law enacted by the General Assembly shall relate to more than one subject, and that shall be expressed in the title, and no law shall be revised, amended, or the provisions thereof extended or conferred by reference to its title only, but so much thereof as is revised, amended, extended or conferred, shall be re-enacted and published at length." Without going into an extended consideration of counsel's argument, it may be said that the case of *Purnell v. Mann*, 105 Ky., 87 (20 R., 1146) 48 S. W., 407, in which the election law of 1898 was held not objectionable by reason of this constitutional provision, was not overruled in *Pratt v. Breckenridge*, 112 Ky., 1, 23 R., 1356, 1858, 65 S. W., 136, in so far as the former case passed upon this question. In the recent case of *Stewart v. Rose*, 24 R., 347, 68 S. W., 465, while this question was not specifically considered, the validity of the act of 1900 was recognized. So far as the decisions go, the constitutional question here raised is decided adversely to appellant's contention, and the court is not disposed to reopen the question.

For the reasons given, the judgment is affirmed.

Judge Paynter dissents.

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CASE 29—ACTION BY NELLIE R. HILL AGAINST S. W. RAGLAND ON HIS BOND AS SHERIFF FOR WRONGFULLY LEVYING AN ATTACHMENT.—DEC. 3.

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APPEAL FROM WARREN CIRCUIT COURT.

JUDGMENT FOR DEFENDANT AND PLAINTIFF APPEALS. REVERSED.

SHERIFFS—ACTION ON OFFICIAL BOND—LIABILITY OF SURETIES FOR WRONGFUL LEVY OF ATTACHMENT—LIMITATION—PLEADINGS—DEFECTIVE PLEA CURED BY VERDICT—DEFENCES—JUDGMENT NON OBSTANTE VEREDICTO.

Held: 1. The official bond of a sheriff covers his wrongful act in levying an attachment upon the property of a stranger to the suit, and entitles the owner to recover damages against the sureties on said bond; the act of making the wrongful seizure being a breach of the covenant "to well and faithfully perform the duties of his office," and gave a right of action that instant, against the sheriff and his sureties.

2. The action against the sheriff not being for a tort, but for a breach of his official bond, is not barred under the five year statute, section 2515, nor the seven year statute, section 2551, and the liability against him and his sureties continues for fifteen years from the breach under section 2514, Kentucky Statutes.

3. A judgment, "*non obstante veredicto*," should not be rendered by the court in a case where the parties understood and attempted to join an issue to be tried, however defective in form the pleadings may be, and a verdict for the one or the other in such case will be held to cure such defective pleadings, unless the facts, when considered as properly pleaded, do not entitle the party obtaining the verdict to the relief given.

4. The taking of a bond of indemnity by the sheriff before executing an order of attachment will not protect him from a suit by a stranger to the writ whose property has been erroneously levied on.

5. The fact that the goods so wrongfully taken were delivered by the sheriff to the receiver of the court and sold by him under order of the court, will not protect the sheriff, the sale

114	209
119	540

114	209
1135	22
1135	158

114	209
132	539

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being made merely to preserve the property under section 218, Civil Code; the original fault being the sheriff's the consequences must fall on him.

6. The action of the court in rejecting an amended answer, tendered after one trial, denying that appellant was the owner of the goods levied on, which had stood confessed up to that time, was not an abuse of discretion in the court.

JOHN M. GALLOWAY AND GEORGE H. GALLOWAY, FOR APPELLANT.

This is an appeal from a judgment of the lower court rendered in favor of appellee, notwithstanding the verdict of the jury in favor of appellant who was plaintiff below.

It is urged by appellee that said judgment should be sustained for the reason that neither the petition nor amended petitions set up any cause of action against the defendant on his bond as sheriff, that such omission had not been waived by the defendant and is not cured by the verdict.

The plaintiff alleges that the defendant "by taking her goods under the order of attachment to which writ she was a stranger, violated his covenant and committed a breach of his bond, as sheriff, then in force and of record in the proper office with E. P. Neale and others, on it, as sureties."

1. We submit that the omission to expressly allege the execution of the bond, though proper to do so, can only be reached by plea.

2. The defendant, in his answer admits he attached plaintiff's goods, but denies that he thereby committed a breach of his bond, and denies the value of the goods as alleged, and we contend that by such a plea he waived the failure of plaintiff to allege its due execution, by thus treating and accepting the petition as containing every needed allegation as to the bond and its execution.

3. In all the voluminous pleadings in this case there was but one central dominating issue, and that was the amount in damages that plaintiff should recover, all other issues being incidental and so treated by both parties.

4. We insist that under the pleadings, and issue as made and understood by the parties, that all defects in the pleadings were waived and especially after such defects were cured by two verdicts in favor of the appellant.

AUTHORITIES CITED.

Newman on Pleadings, pp. 431, 433; Briggs v. Maltly, 2 Met., 88; Mann v. Martin's Admr., 82 Ky., 243; Forsythe v.

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Ellis, 4 J. J. M., 302; Daniels v. Holland, 4 J. J. M., 18; Drake's Admr. v. Semonin, etc., 82 Ky., 291; Bliss on Code Pleading, secs. 438 and 439; Escott & Son v. White, 10 Bush, 169; Louisville & Portland Canal Co. v. Murphy, 9 Bush, 522; Jewell v. Mills, etc. 3 Bush, 65; Chesapeake & Ohio R. R. Co. v. Thleman, 96 Ky., 507; Evans v. Stone, 80 Ky., 78; Rogers v. Felton, Receiver, 98 Ky., 148; Wilson v. Hunt, 6 B. M., 379; Mast Crowell v. Lehman, 100 Ky., 469; Mulliken's Exr. v. Mulliken, 15 L. R., 610; Malcolm v. Same, 19 L. R., 563; L. & N. R. R. Co. v. Lawes, 21 Id., 1793; Railway Officials, &c. v. Beddow, 23 L. R., 1438; Owings v. Frier, 2 A. K. Mar., 268; Commonwealth v. Stockton, 5 T. B. Mon., 192; Same v. Davis, 9 B. Mon., 128; L. & N. R. R. v. Copas, 95 Ky., 460; Keaton Lumber Co. v. Thleman, 144 U. S., 434.

W. B. GAINES AND WRIGHT & McELROY, FOR APPELLEE.

POINTS AND CITATIONS.

Sheriff's Revenue Bond, sec. 4133, Kentucky Statutes; Sheriff's General Bond, sec. 4556, Kentucky Statutes.

1. Appellee being once entitled to a judgment, no judgment could thereafter be rendered against him. Evans v. Stone, 80 Ky., 78.

2. The cause of action arose at once upon seizing the goods. Brock v. Church, 5 Ky. Law Rep., 855; Rudy v. Johnson, 11 Bush, 543; Sutor v. Miles, 2 B. M., 469.

3. When a motion for a judgment *non obstante* is proper. Mulliken's Exr. v. Mulliken, 15 Ky. Law Rep., 609.

4. Ragland had the right to deny the ownership in Mrs. Hill. Mann v. Martin, 82 Ky., 242.

5. An order appointing a receiver is final. Civil Code, sec. 298.

6. The only possible cause of action in this case. Jones v. Bibb, 12 Ky. Law Rep., 605.

7. It is necessary to allege execution of the bond. Newman on Pleading and Practice, p. 392; Creutz v. Arteman, 8 Ky. Law Rep., 422; Laswell v. Johnson, 8 Ky. Law Rep., 536.

8. It is necessary to allege the covenants of the bond. Newman on Pleading and Practice, 392; Kennedy v. Crawley, 4 Ky. Law Rep., 622; Mann v. Martin, 82 Ky., 242; Pryse v. Titus, 7 Ky. Law Rep., 680.

9. The exhibit can not supply the allegations. Newman on Pleadings and Practice, 393; Kennedy v. Crawley, 4 Ky. Law Rep., 622; Blackwell v. White, 7 Ky. Law Rep., 680; Allen v. Shotridge, 1 Duv., 35; Green v. Page, 80 Ky., 368.

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10. The petition was not cured by the verdict. *Western Assurance Co. v. Ray & Co.*, 20 Ky. Law Rep., 1360.

11. If not upon the bond it was barred in five years. *Kinnison v. Carpenter*, 9 Bush, 599.

12. The suit upon the bond barred in five years. The 15 year statute, 2514; the 5 year statute, 2515; *Royse v. Reynolds*, 10 Bush, 286.

OPINION OF THE COURT BY JUDGE O'REAR—REVERSING.

Appellant, Mrs. Hill, sued appellee Ragland, on his official bond as sheriff of Warren county, for having wrongfully levied an order of attachment upon her stock of merchandise; the attachment not having issued against her property, but against that of her husband, P. J. Hill. The attachment was levied in July, 1893. Under familiar provisions of the Code of Practice, the attached property was consigned to the receiver of the court, and by him sold, and the proceeds brought into court to be disposed of according to the rights of the parties as finally fixed by the judgment in that case. The circuit court held that the property belonged to P. J. Hill, and denied the claim of Mrs. Hill, appellant, who had intervened by a petition and claim. Mrs. Hill prosecuted an appeal to this court. The judgment was reversed, it being the opinion of this court that it was Mrs. Hill's property. At the receiver's sale the property brought about \$1,400. Some of this money was appropriated to the payment of costs in the action, and \$734.62 of it was paid over to Mrs. Hill on March 10, 1897. Mrs. Hill afterwards collected from the debtors of her husband, who had sued out the attachment, \$361. In this suit she claims that the value of her goods so attached and sold was \$2,500. After allowing credit for the two smaller sums above named, she seeks a judgment against the sheriff for the remainder. The allegations of the petition as to the execution of defendant's bond, its covenants, and the breach thereof, are as fol-

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lows: "Wherefore she says defendant Ragland, by his trespass upon and seizure and forcibly taking from her said stock of goods, etc., caused her to lose, and damaged her the value of said goods so taken by him, and upon and under an attachment against another, and thus violated and committed a breach of his bond as sheriff, then in force and of record, with his codefendant, E. P. Neale, and others, as sureties upon it; and especially as he violated and failed to perform his official duty, and wrongfully violated his said bond and its covenants and requirements, when he seized and took her said property in a proceeding and under an order of attachment against another, and not her, and in which and under which she was in no way connected. Copy of said bond is filed as part hereof, marked, 'A.' She says that by said trespass and wrongful seizure of her said property said sheriff caused her to lose her said stock of goods, then worth at least twenty-five hundred dollars." It subsequently developed that the bond marked "A," and referred to in the petition, was not in fact the official bond of the sheriff, but its covenants were so general and so similar to those of the official bond that the pleader, and, it seems, the county clerk, making the copy, too, had made a mistake in using this copy as a copy of the proper bond. Therefore on the 29th of May, 1901, plaintiff filed an amended petition, setting out the above mistake, and filing a copy of the proper official bond. The allegations of the petition concerning this bond are as follows: "She says that she did not know of said mistake until May 27, 1901, or that the wrong bond had been filed by her attorney, when she had said clerk's office searched, and failed to find defendant's original general bond for and covering 1893, but found it copied in the order book then kept, and had it and the order of approval cop-

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ied, which she now files as part hereof, marked 'Bond,' and in lieu of the bond heretofore filed by mistake, and bases her cause of action upon said bond now filed, and applies all her allegations as to defendant's liability and as to his bond in her petition as she intended and understood as she had originally done, and to May 27, 1901, upon said sheriff's general official bond, and not his revenue bond; and she asks to file this pleading, that justice may be done her, and prays as heretofore." It is perfectly apparent that this petition, even as amended, is fatally defective. It does not, in proper terms, set out the execution of the bond, or the fact that it had been accepted or approved by the proper authority, or its covenants. The defendants did not demur to the petition, but answered it. The answer did not deny that appellee was at the time sheriff of Warren county, and, as such, executed the attachment mentioned. On the contrary, it admitted these facts. The first paragraph of the answer was an attempt to deny that the plaintiff was the owner of the stock of goods referred to. This paragraph, however was stricken out. The second paragraph undertook to justify the levy of the attachment by pleading that the attachment issued in the suit of B. M. Creel & Co. against P. J. Hill, and was addressed to the defendant, as sheriff, commanding him to attach the property of the said P. J. Hill; that he was instructed to levy on the property named in this suit; "that, being uncertain as to whether said property was liable to seizure under said attachment, he required the plaintiff to execute a bond of indemnity to him." Then follows the bond, with its covenants, etc. He then pleaded that the plaintiff in this case joined issue in the suit of Creel & Co. against P. J. Hill as to her ownership of the property, and that the court in that action placed the prop-

erty in the hands of J. D. Hines as receiver, who, under orders of the court, took charge of the stock of goods and sold it. He also pleaded the fact of the circuit court having adjudged the goods liable to P. J. Hill's debt, and the reversal of that judgment by this court, and the subsequent judgment in conformity with the mandate from this court that the goods belonged to appellant, Mrs. Hill. In an amended answer, which was allowed, the sheriff pleaded the five years statute of limitation, based upon the idea that the action of the sheriff in levying upon the plaintiff's goods was simply a tort, which was barred by the statute after five years from its commission, which was the date and occasion of the levy complained of. The surety also pleaded the special seven-year statute of limitation, applicable to sureties, and was thereupon discharged. A demurrer was sustained to the sheriff's plea of the five years statute. Upon the trial of the issues, the jury returned a verdict in favor of the plaintiff for \$905, after allowing the credits adverted to. Appellee entered a motion for judgment notwithstanding the verdict, which was overruled. Then he filed a motion for a new trial on various grounds, which was sustained; the ground upon which the motion was sustained being the mistake as to the bond sued on, above referred to. Upon another trial upon the same issue (that is, the value of the stock of goods at the time of the levy, and appellee's liability therefor upon his official bond as sheriff), the jury, allowing the credits admitted, returned a verdict in favor of the plaintiff for \$1,000. Appellee moved before the submission to the jury for a peremptory instruction, without disclosing the grounds therefor, which motion was overruled. He again moved the court for a judgment notwithstanding the verdict, and also filed a motion and grounds for new trial. The court sustained the

notion to render a judgment for the defendant notwithstanding the verdict of the jury, and dismissed appellant's petition. From this action of the court she has appealed. The questions thereby presented for decision are (1) the cause of action sued on; (2) the statutory period of limitation applicable to same; and (3) the availability of the motion for judgment *non obstante veredicto*.

1. From a very casual inspection of the petition and exhibits, it is evident that plaintiff was attempting to assert a cause of action against appellee for his official misconduct in levying upon her goods under process against another alone, and was seeking a recovery therefor upon his official bond executed by him as sheriff. Otherwise the references to the bond, and the breach of its covenants, and the filing of the copy, as well as joining one of the sureties as a defendant, would be meaningless. That the official bond of the sheriff covers his tortious act in levying a writ upon the property of a stranger to the suit, and entitles the owner to recover his damages against the official's bondsmen, is no longer an open question. *Forsythe v. Ellis*, 4 J. J. Marsh, 298, 20 Am. Dec., 218; *Com. v. Stockton*, 5 T. B. Mon., 192; *Jewell v. Mills*, 3 Bush, 64. In that state of case the action is upon the bond; the breach being the wrongful seizure of the stranger's goods under process, which made the act an official one, instead of a personal trespass. The act of making the wrongful seizure was a breach of the covenant of the bond "to well and faithfully perform the duties of his office," and gave a right of action that instant against the sheriff and his sureties.

2. Under section 2551, Kentucky Statutes, the sureties were released after seven years. That fact is not disputed now in this case. But as against the sheriff, section 2514, Kentucky Statutes, applies, allowing 15 years within which

to commence the action "upon the official bond of the sheriff." We consequently construe that the five-year statute (section 2515, Kentucky Statutes), applicable ordinarily to torts, does not apply to this case. Notable stress in argument is laid upon the idea that the averments of this petition are so defective as to make the complaint one against the sheriff, and not a suit upon his official bond. We can not conceive how an action against a sheriff for a wrongful act done by him under color and by virtue of his office, acting under a writ which by law he was permitted and authorized to execute, can be other than a breach of his bond. He acts only in virtue of the authority given him by law, and then only because of, and always under, his official bond. The very purpose of requiring it was to protect the public against the officer's wrongful acts as such, whether of omission or commission. In *Forsythe v. Ellis*, 4 J. J. Marsh, 302, 20 Am. Dec., 218, it was said: "The official bond should bind the sheriff no further than he would be liable without it. Its only object is to secure the faithful performance of official duty. And therefore no official act can be considered a breach of the condition of the bond, faithfully to execute the duties of the office, unless it would, without a bond, amount to a breach of official duty." The converse must be equally true. In *Hargis v. Sewell's Adm'r*, 87 Ky., 69 (9 R., 920) 7 S. W., 557—an action against an administrator for failure to discharge a duty imposed by his office—the question was raised whether the statute fixing limitation of an action on his bond (section 2524, *supra*) applied, or whether the administrator was bound as a trustee of an express trust. In disposing of that question this court said: "If he is not liable upon his written obligation to pay this money and discharge faithfully his duties as administrator [by his bond], we can not well see

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in what manner a personal liability can arise by reason of an implied undertaking to discharge similar duties. The bond is required to be executed with surety for the faithful performance of the trust, and on this bond the appellants must proceed with the limitation of fifteen years applying to the principal obligor." We think the reasoning of that opinion applies as truly here.

3. The practice obtaining in ordering a judgment for the party entitled thereto upon the pleadings has had, first and last, frequent attention by this court. The rule as laid down by Chitty, viz., "When the verdict can be fairly considered as establishing between the parties the very fact which should have been, but is not, precisely averred in the declaration, and especially when it clearly appears that the particular fact was understood by the parties to be the point in issue to be decided by the jury, it would be unnecessary for the ends of justice, and would be more than useless, to remand the case, that it should again be presented for the consideration of the jury," has been approved and applied in terms by this court in numerous cases: *Riggs v. Maltby*, 2 Metc., 90; *Forsythe v. Ellis*, 4 J. J. Marsh, 302 (20 Am. Dec., 218); *Daniel v. Holland*, Id., 21; *Drake's Adm'r v. Semonin*, 82 Ky., 291 (5 R., 183); *Escott v. White*, 10 Bush, 169; *Railroad Co. v. Thieman*, 96 Ky., 510 (16 R., 611) 29 S. W., 357; *Evans v. Stone*, 80 Ky., 78 (3 R., 751); *Wilson v. Hunt's Adm'r*, 6 B. Mon., 379; *Rogers v. Felton*, 98 Ky., 150 (17 R., 724) 32 S. W., 405; *Mast v. Lehman*, 100 Ky., 466 (18 R., 949) 38 S. W., 1056; *Railroad Co. v. Copas*, 95 Ky., 460 (14 R., 572) 26 S. W., 179; *Railroad Co. v. Lawes*, 56 S. W., 426 (21 R., 1793); *Assurance Co. v. Ray*, 105 Ky., 523 (20 R., 1360) 49 S. W., 326. Notwithstanding, we encounter these motions with a frequency that would seem to indicate a failure to ap-

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preciate the spirit of the rule. At common law a judgment *non obstante verdicto* was entered for the plaintiff only, and that when the plea confessed the cause of action, and set up insufficient matters in avoidance to constitute either a defense or a bar (2 Tidd, Prac., 922; cases collected at page 912, 11 Ency. Pl. & Prac.); or, as expressed by Smith, Act., 161: "Judgment *non obstante verdicto* is a judgment rendered in favor of the plaintiff notwithstanding the verdict for the defendant. This judgment is given upon motion (which can only be made by the plaintiff) when, upon an examination of the whole proceedings, it appears to the court that the defendant has admitted himself to be in the wrong, and that the issue, though decided in his favor by the jury, is on a point which does not at all better his case." The complaint being confessed, the plea must have been bad in substance, not merely in form, it seems, to have entitled the plaintiff to a judgment notwithstanding the verdict. *Pim v. Grazebrook*, 2 C. B., 429. By section 386 of our Civil Code of Practice (a re-enactment of section 416 of Meyer's Code), it is provided, "Judgment shall be given for the party whom the pleadings entitle thereto;" thus giving to the defendant the same privilege in this respect as is enjoyed by the plaintiff. Otherwise this section is merely a statutory recognition of the common-law practice on this subject. The motion should prevail only where the state of pleadings upon the merits entitles one party to a judgment notwithstanding a contrary verdict, and without particular regard to the form of the pleading. *Fitch v. Scot*, 1 Root, 351; *Rothchild v. Bruscke*, 131 Ill., 265, 23 N. E., 419; *Freem. Judgm.*, section 7; *Ballou v. Harris*, 5 R. I., 419; *Aird v. Haynie*, 36 Ill., 174; *Macomb v. Wilber*, 16 Johns., 227; *Otis v. Hitchcock*, 6 Wend., 433. This court said in *Drake's Adm'r v. Semonin*, supra: "The better rule,

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and in fact the one recognized by all the elementary authorities on the subject of Pleading including Mr. Chitty, is that where there is a total omission to state a cause of action or some fact essential to the cause of action has been wholly omitted the verdict will not cure the defect,"—as, for example, in this case, if there had been a total omission of reference to appellee's official position, and of the fact of his having executed an official bond as sheriff. It seems that there has been a misconception of the office of this motion and practice. It has been thought that it was one way and that a most effective one, to use a demurrer upon a bad pleading. But this is not so. Where the parties have attempted to join an issue to be tried, and which has been tried, however defective in form the pleadings may be, a verdict for the one or the other will be held to cure such defective pleading,—that is, will cure them as to their form, supplying all omitted necessary averments concerning essential facts relied on, provided the proof or admission of such facts were necessarily considered before the verdict could have been rendered. Then, if such facts, when considered as if properly plead as to form, do not entitle the party obtaining the verdict to that relief in law, the judgment will be for his adversary.

Applying these principles to the state of case at bar, we have a suit brought against the officer for that which in law is a breach of his official duty to the plaintiff, and an attempt to charge him therefor on his official bond. The pleading is obviously defective in form, but in form only. An issue is joined by the litigants as to the right of the plaintiff to recover, and the verdict is for the plaintiff. The motion for a judgment for defendant *non obstante veredicto* would be to admit plaintiff's pleading as good in every particular in form,—that is, as to technical averments con-

cerning the signing, delivery, and acceptance of the bond, its particular covenants, and their breach,—and yet insist, as a matter of law, that defendant should be given judgment. We have just seen that the answer is not a bar as to limitation pleaded. Nor does the taking of a bond of indemnity before executing an attachment protect the officer from suit by a stranger to the writ, whose property has been erroneously levied upon, as in case of execution. *Lewis v. Mansfield*, 78 Ky., 460; *Gevedon v. Branham* (20 R., 791), 47 S. W., 589. There was no other matter pleaded either in bar or avoidance, except appellee also attempted to avoid the liability by showing that, although he levied upon the goods, he did not sell them, but that they were sold by the receiver of the court under the orders of the court, and that therefore appellee should be held liable only for such damage as resulted to the goods by the mere act of levying upon them and holding them for a few days. The circuit court rejected this plea, and we think properly so. The court's action in ordering the property sold by a receiver was merely to preserve the attached property by converting it into a form less expensive and more stable, under provisions of section 218 of the Civil Code of Practice, until such time as the court might be able to regularly proceed to determine its liability—the disputed fact—to the debt upon which it had been taken. The sheriff, by his wrongful act, had set in motion the train of evil culminating in the loss of appellant's property by its sale under the orders of the court to which he had delivered it wrongfully as the property of another. The original fault was his, and the consequences must be upon him. It follows that the motion for judgment for defendant notwithstanding the verdict for plaintiff should have been overruled.

Appellee offered an amended answer, after the case had

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been at issue for a considerable while, denying that appellant was the owner of the stock of merchandise levied on under the writ, and on the occasion complained of. The court rejected it. Whether it was because of its tardiness, or that the matter was not an issuable one in this case, is not stated. After one trial, it can not be said that the trial court abused a sound discretion in disallowing the tender of an issue as to the ownership of the goods, which up to that time had stood confessed in the case, even if appellee could have put the matter in issue after the judgment determining that fact in appellant's favor in the other suit.

The judgment is reversed, and cause remanded, with directions to enter a judgment for appellant upon the last verdict of the jury.

Judge Hobson dissents. Chief Justice Guffy not sitting. Petition for rehearing by appellee overruled.

CASE 30—ELECTION CONTEST BY W. C. EVERSOLE V. IRA COMBS FOR COUNTY JUDGE.—DEC. 3.

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APPEAL FROM PERRY CIRCUIT COURT.

JUDGMENT FOR CONTESTANT, CONTESTEE APPEALS. AFFIRMED.

ELECTIONS—CONTEST—TIME FOR ANSWERING—FLAGRANT DISREGARD OF ELECTION LAW.

- Held: 1. Under Election Law EX. Sess. 1900, section 12, providing that, within twenty days after the service of summons on him, the contestee shall answer, the day on which the summons is served is included in the twenty days.
2. The returns of a precinct will be disregarded,—the officers having abandoned efforts to keep the crowd the proper distance from

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the voting room; a large number of ballots having been marked openly for voters, by one or more of the officers in the presence of the crowd, who could and did witness the details; some one of the officers having accompanied other voters to the booth, and there marked their ballots for them; none of the voters having been sworn as to their disability to mark their ballots, the voting going on while the officers, including the judges, were absent; some of the officers being drunk, and a judge so that he was unable to discharge his duties; neither of the judges being able to read or write; none of the officers signing the certificate, neither of the judges participating in the count, but this being done by a challenger and an inspector not appointed or sworn as required by law; the votes of one candidate being returned as for an office for which he was not a candidate, and for which no votes were cast for him; and there being evidence that early in the day one of the judges and the challenger of the opposite party agreed to vote the precinct for a certain combination which won.

W. F. HALL AND E. E. HOGG, FOR APPELLANT.

Our contention is:

1. The petition of contestant is fatally defective and the demurrer thereto should have been sustained because it charges that a large number of voters in certain precincts voted openly and a large number were illegal, but does not state that a single one of the votes, voted for contestee, or that they were counted for contestant, or that appellant received or had counted for him a single vote that he was not by law entitled to. *Wooley v. City of Louisville*, 15 Ky. Law Rep., p. 13.

2. The court erred in sustaining the motion of appellee to strike appellant's answer and counter-claim from the files because not filed within twenty days after service of process on him. Civil Code, sec. 681, 21 Am. & Eng. Ency. P. & Pr., pp. 702, 703, 704 and notes; 19 Ky. Law Rep.,; *Hall v. Cornett*, 1549; Civil Code, sec. 134; *Stewart v. Stamper*, 13 R., 665.

3. The court erred in throwing out the vote of certain precincts because some of the votes cast therein were illegal and which could have been separated from those that were legal. *Berry v. Nicholson*, 11 Am. St. Rep., 767; *Barnes v. Smith*, 33 Am. St. Rep., 491; *People v. Cook*, 59 Am. Dec., 451; *Parvin v. Wambins*, 30 Am. St. Rep., 254; 10 Am. & Eng. Ency. Law, 2 Ed., p. 670; *Banks v. Sergeant*, 20 Ky. Rep., 1024; *Kentucky Statutes*, sec. 1474, *Mayor v. Barker*, 99 Ky., 305

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JOHN C. EVERSOLE AND J. B. MARCUM, FOR APPELLER.

1. The court properly sustained the motion of appellee to strike appellant's answer and counter-claim from the files. Section 12, Acts of the General Assembly 1900, requires the answer to be filed within twenty days after the service of process, which includes the day on which the process was served.

2. The returns from Lost Creek precinct, No. 9, should have been totally disregarded because the evidence shows that thirty-five voters brought in slips of paper with appellant's name written thereon and the clerk of the election, who was an ardent supporter of appellant, would take these slips and openly vote them for appellant, and also voted fifteen other votes in the booth by taking the stencil and marking the ballot for the voter himself; that the election officers were in a drunken condition all during the day, did not pay any attention to the counting and certifying the returns, and did not sign the election returns, in fact were illiterate and could not sign their names.

AUTHORITIES CITED.

Sec. 12, p. 39 Acts of the General Assembly, Extra Session, August 1900; Child v. Smith's Heirs, 13 B. Monroe, p. 461, and authorities there cited; Batman v. Megowan, 1st Met., p. 533 and authorities cited; Wood v. Com., 11 Bush, p. 220; Bellaris v. Hester, 1 Lord Raymond, and authorities there cited; Moor v. Covington City Nat. Bank, 80 Ky. p. 305; 4th Ed.; McCrary on Elections, sec. 427, p. 312; 12 Bush, p. 401; 28 Mo., pp. 259 and 278; 92 Mo., p. 13; Rowan v. Nixon, 45 Mo., p. 340; Seely v. Killerman, 53 Minn., p. 240; Anderson v. Lykins, 20 Ky. Law Rep., p. 1001; Banks v. Sergeant, 20 Ky. Law Rep., p. 1024; 4th Ed. McCrary on Elections, p. 374, and authorities cited; Beckner v. L. & N. R. R. Co., 4 Bush, p. 619; 14 Bush, 289; McDowell v. C. & O. R. R. Co., 90 Ky., p. 346; 93 Ky., p. 177; Mitchell v. Mattingly, 1 Met., 237; Lunsford v. Culton, 15 Ky. Law Rep., 497; Atty. General v. May, 99 Mich., p. 533; Russell v. McDowell, 83 Cal., p. 87; People v. Cicott, 16 Mich., p. 203; Campbell v. Mooray Mob., p. 215; Hurd v. Romies Mob., p. 429; Davidson v. Johnson (M. S., 9, p. 9, April 29, 1902.)

OPINION OF COURT BY JUDGE O'REAR—AFFIRMING.

This is a contested election case involving the title to the office of county judge of Perry county. The election was held November, 1901. On the face of the returns appellant

is shown to have had a majority of 32. The substance of the grounds of contest, as set forth in the petition, is that the election officers and voters of certain precincts, which gave to appellant large majorities, had totally disregarded the provisions of the law concerning the holding of elections, and had practically voted by an "open ballot." The petition was filed and summons issued in this case on the 15th of November, summoning the defendant to answer the allegations of the petition on the first day of the following December term of the court, which convened, under the statute, on the second Monday in December. That happened to be the 9th day of December, 1901. The summons was served on the 20th day of November, 1901. Appellant filed his answer, containing a counterclaim, with countercharges against certain precincts in the county which had given majorities to appellee, on the 10th day of December, 1901, being of the second day of the December term, 1901, of the Perry circuit court. On motion of appellee, appellant's answer was stricken from the files. Before the motion was acted upon, however, appellee had filed a reply, without waiving his motion, and in the reply had pleaded the special statute of limitation found in the act of the extraordinary session of 1900 (page 39) concerning elections. The part of section 12 of that act applicable to this practice is as follows: "Within twenty days after the service of summons upon him the contestee shall file his answer, which may consist of a denial of the averments of the petition and may also set up grounds of contest against the contestant, and if grounds are so set up they shall be especially pointed out and none other shall thereafter be relied upon by said party." In *Chiles v. Smith's Heirs*, 13 B. Mon., 461, the rule in regard to the computation of time was thus stated: "When the computation is to be made from an act done,

the day in which the act was done must be included, because, since there is no fraction of a day, the act relates to the first moment of the day in which it was done. But when the computation is to be from the day itself, and not from the act done, then the day in which the act was done must be excluded." The rule thus announced was followed in *Batman v. Megowan*, 1 Metc., 533,—an action contesting the office of jailer of Jefferson county. The statute then in existence required the notice of contest to be given within ten days after the issual of the certificate of election. The court said: "A notice that the election would be contested could have been given on the same day the final action took place. . . . Having a right to give a notice on the 6th day of the month, if he could also give it on the 16th, it would be allowing him a period of eleven days within which to give it, although the statute declares expressly that no application to contest an election shall be heard unless the notice be given within ten days after the final action of the board. The notice was given on the eleventh day after such an action, and was not, therefore, within the time allowed by the statute." Also, see *Wood v. Com.*, 11 Bush, 220; *Mooar v. Bank*, 80 Ky., 305; 3 R., 674. The statutory provision requiring notice of contest to be given within a given time from the date of the final action, or from the declaration of the result, or the issuing of the certificate of election, or the like, is peremptory, and the time can not be enlarged." *McCrary, Elec.*, 312. In *Anderson v. Likens*, 104 Ky., 699; 20 R., 1001; 47 S. W., 867, the question was whether a contestant could file an amended notice setting up additional grounds of contest. This court held that it was the policy of the law "to require the proceeding for contesting the election of an officer, for public reasons, to be commenced as soon as prac-

licable after the final action of the canvassing board, and terminated by the judicial decision, without continuance or delay usually tolerated in litigation of other matters." The rule applicable generally as to allowing amendments was held not to apply. This was followed in *Banks v. Sergeant*, 104 Ky., 849 (20 R., 1024), (18 S. W., 149). The court is of opinion that the same rule applicable to the filing of the original petition, as to time, should apply to the defendant, governing his right to file an answer and grounds of counter contest. The reason is as strong in one case as the other, and the terms of the statute are as positive and as mandatory. The court properly rejected the answer in this case, it having been filed after the twenty days allowed by the statute.

This is the same general election under consideration in the case of *Napier v. Cornett*, 24 R., 576, 68 S. W., 1076. In that case we found that the manner of conducting the election in a number of the precincts had been more or less irregular; but, with one, possibly two exceptions, these irregularities seem to have been innocent, so far as the officers and participants were concerned, and were not shown to have in any wise affected the result of the election. It was therefore determined not to put the community to the expense and annoyance of a new election, under the circumstances. It was not necessary in that case to pass upon the effect of the irregularities in precinct No. 9, known as "Lost Creek," and No. 6, known as "Carr's Fork." In the former opinion, above referred to, it was said: "As a rule, except in two of the precincts, the irregularities were trivial, and such as resulted naturally from holding elections with the insufficient accommodations afforded by country school houses. Except in Lost Creek precinct, which returned a vote of 76 to 9 in favor of contestant, there seems

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to be no specific evidence of fraud or violence. In that precinct there seems to have been little pretense of propriety, and in one of the other precincts, which showed an almost equal disparity in the vote in favor of contestee, the proceedings were not very much better." It was found, however, that to disregard the returns from either of the precincts referred to would not have changed the result in that case. Following the opinion, and adhering to what was said in *Napier v. Cornett*, *supra* (the same facts appearing in this record as in that), the irregularities in the other precincts are not sufficient to invalidate the election therein. But in this case it becomes necessary to consider and decide the effect of the manner of conducting the election in one of these precincts (No. 9 or No. 6), as this case depends upon such determination. As to disregard the returns in either of the precincts named is to affirm the judgment of the circuit court, we will consider but one of them, viz., Lost Creek, or No. 9.

The record shows that in this precinct the election was held in a small boxhouse, about twelve feet square. The cracks between the boxing plank were not stripped or covered, and the planks had so shrunk apart as to widen these cracks so that persons on the outside could see through into the voting room. There does not appear to have been a window to the room, and consequently the door was left open during the whole day. The crowd approached to the door, standing about it and in it, and peeping through the cracks, although the law forbade them to be nearer than fifty feet to the voting room, except the voter when voting. The sheriff of election for a while tried to keep them away the statutory distance, but they defied him, and paid no attention to his commands. For more than half of the day all effort to keep the crowd back was abandoned. The

officers allowed "illiterates," about twenty or more, to be voted openly; that is, upon their statement that they could not read or write, the officers, or one of them (generally the clerk), marked such voter's ballot as it lay spread on the table, in the presence of all the officers of the election, and of the crowd, who could and did witness the details of the proceedings. About thirty-five votes are shown to have been voted from "slips;" that is, the voter would come into the voting room with a slip of paper on which were written names of persons for whom he said he wanted to vote. The clerk or other officer thereupon marked his ballot in plain view of the other officers and the crowd. Some fifteen voters or more the clerk or other officer accompanied to the voting booth, and there marked the ballots for them. It is suggested that this is, or could easily have been, a sure method of effectuating bribery. None of these voters were sworn as to their physical disability to mark their ballots. From time to time some of the officers of the election, the judges included, would absent themselves from the room; the voting continuing in their absence. One of the challengers and one of the judges were drunk. The judge was shown to have been so drunk as to have been utterly disabled from discharging his duties throughout a great part of the day. Neither of the judges could write or read. The one who was not drunk could not vote his own ballot, but it was marked for him by the clerk, with the same indifference as to its secrecy as many of the others. None of the officers signed the certificate. Two of them could not have written their names. The others did not. Neither of the judges participated in the count of the ballots. That important ceremony was performed by the Republican inspector and the Democratic challenger, neither of whom appears to have been appointed or sworn as required by law.

As an evidence of the probable looseness of the count and certificate, the man admittedly receiving the highest number of votes for magistrate was not certified any votes for that office, but was certified to have received the highest number of votes for the office of constable, for which he was not a candidate, and no votes had been cast for him for that office. There is evidence to the effect that one of the judges and the challenger of the opposite party early in the day had agreed "to vote that precinct" for a certain combination of candidates,—the ones who won. This fact is not, however, sufficiently shown to alone warrant a disregard of the result there. Upon the whole, a more flagrant disregard of the election laws by officers and voters generally can hardly be imagined. The policy of this court has been to overlook misfeasances of election officers in the conduct of elections, in giving effect to the will of the voters where it can fairly be gathered from the returns, leaving the question of punishment to the criminal jurisdictions. But to suffer an election to be held as was done in this precinct would be to abandon all safeguards provided by the Constitution and the Legislature for insuring a fair and equal election by secret ballot. *Banks v. Sergeant*, 104 Ky., 849 (20 R., 1024), 48 S. W., 149.

The result in precinct No. 9 should have been disregarded. To do so is to award the certificate of election to appellee. The judgment of the circuit court is therefore affirmed.

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CASE 31—ELECTION CONTEST BY T. H. LITTLE V. PHILIP HALL AND
OTHERS FOR JUSTICE OF THE PEACE.—DEC. 3.

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114	461

APPEAL FROM JACKSON CIRCUIT COURT.

JUDGMENT FOR DEFENDANTS AND PLAINTIFF APPEALS. AFFIRMED.

ELECTIONS—PARTY DEVICE AND INDIVIDUAL DEVICE—VOTER MARKING
IN BOTH.

Held: 1. Acts 1900, Ex. Sess., p. 12, section 4, provides that, should any elector desire to vote for each and every candidate of one party, he shall mark a cross-mark in the circle under the device of that party, and that if the cross-mark is made in the circle under the party device, and the cross-mark is also made after one or more candidates of a different party, the ballot shall be counted for the candidate so marked, and for the other candidates of the party marked. The statute also declares that no ballot shall be rejected for any technical error which does not make it impossible to determine the voter's choice. HELD, that where an independent candidate adopted an individual device, and there was no other candidate under such device, a mark in the circle under a party device and under the device of such independent candidate required the ballot to be counted for such candidate, and not for the candidate for the same office under a party device.

A. W. BAKER AND T. J. COYLE, FOR APPELLANT.

There were seventy-six undisputed ballots cast for Hall, appellee, and forty-seven undisputed ballots cast for appellant, Little; thirty ballots were cast for both Hall and Little, by the voters placing the stencil, or cross mark, in the circle under the log cabin under which Little's name was placed, and the same ballots were also stamped under the mule under which device the name of Hall was placed, Hall and Little being both candidates for justice of the peace.

1. We contend that one who, in voting, stamps or marks in two circles under two devices of opposing candidates renders his vote invalid and the vote should not be counted.

The fact that there were candidates under the log cabin for other offices besides justice of the peace, and that the device

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under which Hall's name was placed was an individual device, will not authorize votes stamped in both devices, to be counted for all and against Little and also counted for the candidates for the other offices under the log cabin besides justice of the peace.

E. E. HOGG, FOR APPELLEE.

There is only one question in this case, and that is, whether a ballot marked in the circle under the Republican device, and at the same time in the circle under an individual device, where there is an opposing candidate for the same office under each device should be counted for either and if so for which?

Appellant's name was on the ballot as the party nominee with other candidates for other offices. Appellee's name was on the ballot by virtue of a petition under an individual device.

Our contention is, that the voter in stamping under both devices showed his intention to vote for all the candidates under the log cabin, except the one who was opposing the candidate for the same office whose name was under the individual device and desired his vote to be counted for the candidate under the individual device.

OPINION OF THE COURT BY JUDGE DURELLE—AFFIRMING.

At the November election, 1901, appellant, Little, was a candidate for the office of justice of the peace in the Third magisterial district of Jackson county, on the Republican ticket, and his name was placed under the device of the log cabin on the official ballot. Appellee Hall was an independent candidate, by petition, for the same office, and his name was printed on the official ballot under the individual device, chosen by him, of a big mule. There were no other candidates for that office. Under the Democratic device the chicken cock, there was a candidate for representative and no other candidates. Hall was declared elected by the canvassing board, his majority being certified as ten votes. Little contested the election, and the contest was decided against him. There is no controversy about the number of ballots, nor the persons for whom they were counted.

The question arises as to certain ballots in precinct No. 1, which were counted by the election officers and the board of canvassers. There were thirty ballots stamped with the stencil under the Republican device and also in the circle under the mule. There were six ballots stamped with the stencil in the circle under the Democratic device, and in the circle under the big mule. Little received 157 votes in the district, and Hall received 137 votes, about which there is no dispute or contest. Little contends that the thirty-six ballots mentioned, which were stamped under the two devices, should not have been counted for any one. Hall contends that they were properly counted for him. There was also one ballot marked both in the circle under the Democratic device and in the circle under the Republican device. This ballot the election officers did not count for any one, and the circuit court approved their action, upon the ground that they were both party devices, and the fact that there was only one candidate under the Democratic device made no difference, as there was room and a place on that ticket for any officers to be voted for at that election. The consideration of this proposition is, however, not necessary to the decision of this case.

The law provides that "no ballot shall be rejected for any technical error which does not make it impossible to determine the voter's choice." As we have seen, it is not necessary to consider the effect of the voter stamping in the circles under the devices of two party tickets. Undoubtedly, if the two party tickets contained the names of candidates for exactly the same offices, the two marks would cancel each other, and the ballot would be a nullity. But the contestee in this case did not, in his petition, ask to be placed under any party device, and was not placed under such device. No other separate candidate by petition could

have been legally placed under Hall's device. There was no party existing which had the big mule for a device. It was the individual device of Philip Hall. The clerk of the Jackson county court placed the words "Independent Republican Ticket" under Hall's device, and above his name, but that did not make it a party device. Nor could any voter have legally voted for any person for any other office than that of magistrate by writing such person's name in the blank space below Hall's name and stamping in the square to the right of the name thus written. A stamp in the square to the right of Hall's name meant a vote for Hall. A stamp in the circle under the device above Hall's name meant a vote for Hall, and for no one else. Therefore, if a voter desired to vote the Republican ticket, except in the magistrate's race, and in that race desired to vote for Hall, it was as natural for him to stamp in the circle above his name as in the square to the right of his name. It is our duty, under the election law, as written in the statute and construed by the decisions of this court, to endeavor to ascertain the intention of the voter, not by speculation as to his intent, but by the fair and reasonable deductions to be drawn from the marks which he placed upon his ballot. We are not to assume that, in stamping in the circle under the big mule, he was attempting to do a vain thing, but we are to give effect to what he did, and to all that he did, if we can with reasonable certainty arrive at his intent. It is perfectly evident that the thirty voters who stamped under the log cabin and under the mule intended to vote for all the candidates on the Republican ticket, except the candidate for justice of the peace, and in that race intended to vote for the independent candidate. They "scratched" in the circle under the individual device of Hall, instead of in the little square to the right of his name.

because, if they had been voting for Hall alone, a cross-mark in the circle would have had exactly the same effect as a cross-mark in the little square. It is equally clear that the six ballots stamped in the circle under the chicken cock and in the circle under the big mule should be counted for Hall. In this case there was but one candidate under each device, and each candidate was running for a different office. It may be said that this mode of "scratching" a ticket is not the one specifically provided by the statute. On the other hand, there is nothing in the statute which either directly or by implication forbids this mode, and the provision before quoted does, by implication, authorize it. After providing for party devices, and the printing of the list of candidates of a party under its device, the statute provides: "Should any elector desire to vote for each and every candidate of one party he shall make a cross-mark in the circle under the device of said party, and the vote shall be counted for all the candidates under said device; provided, however, if a cross-mark be made in the circle under a party device and a cross-mark be also made after one or more candidates of a different party, or parties, the vote shall be counted for the candidate so marked and not for the candidates for the same offices of the party so marked, but the vote shall be counted for the other candidates of said party." Acts 1900, Ex. Sess., p. 12, sec. 4. It will be observed that this provision of the statute only relates to the candidates of a party printed under the device of the party. On the question how a voter shall proceed when, after making his cross-mark in the circle under the device of a party, he wishes to vote for an independent candidate whose name is printed on the ballot under a device of his own, and not as the candidate of any party, the statute is silent. In the original

act it is provided that the voter may make his cross-mark in the square immediately following the name of the candidate of his choice for each office to be filled; but the Legislature realizing that the voter might not always follow the statutory mode, and intending that unsubstantial errors should not destroy his vote, further provided, "No ballot shall be rejected for any technical error which does not make it impossible to determine the voter's choice." The statute not having pointed out how the vote for an independent candidate must be marked when a cross-mark is made in the device of a party, and having required the county clerk to place a device over the name of an independent candidate where he selects none for himself, it must be presumed that this device is required for some purpose, and a ballot marked in this device must be counted. For a cross-mark in the device as clearly shows the voter's intention to vote for such candidate as if it had been made in the small square opposite his name. If the voter wishes to vote a mixed ticket for the candidates of different political parties, he must follow the statutory method, for, as the statute has directed how this may be done, its method is exclusive, and no other can be followed. But as to the independent candidate, the statute not having so provided, a different rule applies, and his vote must be counted if it is possible to determine from the ballot the voter's choice. It is therefore proper to add—as the question is presented by the record, though not necessary to the decision of the case—that, in our opinion, the rule we have adopted would not apply in the case of a ballot which was marked in the circle under each of two party devices, for the reason that the statute seems to contemplate, and the practice undoubtedly is, that there should be under each party device spaces upon which the voter may vote for some qualified person

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for every office to be filled at the election, although his party may not have provided candidates for each office. No such reason can apply to the case of a single independent candidate whose name is printed under an individual device.

For the reasons given, the judgment is affirmed. Whole court sitting.

Judge Paynter dissents.

CASE 32—PROSECUTION AGAINST CALEB POWERS AS ACCESSORY BEFORE THE FACT TO THE MURDER OF WILLIAM GOSSEL.—DEC. 3.

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APPEAL FROM SCOTT CIRCUIT COURT.

DEFENDANT CONVICTED OF MURDER AND APPEALS. REVERSED.

DISQUALIFICATION OF TRIAL JUDGE—SUFFICIENCY OF AFFIDAVIT—CONSPIRATORS—STATEMENTS OF—COMPETENCY—INTIMIDATION—POLITICAL PLOT—ARMED FORCES—MILITIA—IMPEACHMENT OF WITNESS—POSTPONEMENT OF TRIAL—ADMISSION OF AFFIDAVIT AS DEPOSITION OF ABSENT WITNESS—COMPULSORY PROCESS—CORROBORATION OF Co-CONSPIRATORS—PEREMPTORY INSTRUCTION.

- Held:** 1. Kentucky Statutes, section 968, provides that, if either party shall file his affidavit that the judge will not afford him a fair and impartial trial, the judge shall vacate the bench for that case, in favor of an attorney to be selected to try the cause. **HELD**, that where an affidavit states that the judge will not give the litigant a fair and impartial trial, and sets out as the basis of such belief facts such as would prevent an official of personal integrity from presiding in the case, or from affording a fair and impartial trial, it must be assumed that such facts are true, and the judge must accordingly vacate.
2. Defendant, having been indicted as an accessory before the fact of a murder alleged to have been committed as a part of a political conspiracy, filed his affidavit that the judge was a member of the same political party as deceased, and was his intimate personal friend, and in close sympathy with him in the

114	237
d120	542
114	237
f126	446
114	237
133	96
114	237
138	243

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political imbroglio resulting in the assassination; that by reason thereof, and of the great excitement at the time of the assassination, the judge had conceived a feeling of hostility against defendant which would prevent him from affording a fair and impartial trial of the case; that at a former trial the judge had shown his hostility by specific acts,—especially in the selection of an unfair and prejudiced jury. HELD, that sufficient was alleged to require the judge to vacate the bench on motion under Kentucky Statutes, section 968.

3. Defendant was charged with being an accessory before the fact of murder, and it was sought to show that a large body of citizens who were assembled at the State capital by the instigation of defendant and others were there to intimidate by force the Legislature while acting as the triers of certain election contests, and that in execution of such purpose the murder was committed. HELD, that testimony as to what members of the party said and did while at the capital was competent.
4. Testimony as to an occurrence at a dinner, where one of the party assembled at the capital "sweetened his coffee with a forty-four," was competent.
5. Statements by others at the capital, not shown to have been acting with the accused, or with others indicted with him, were not competent against defendant.
6. The fact that persons visited the statehouse square during the contest proceedings, and had access to those jointly indicted with defendant was not sufficient to connect them with the alleged plot, so as to render admissible against the defendant statements made by them.
7. The fact that witnesses had information which led them to believe that deceased would be assassinated did not prove or tend to prove them parties to the alleged conspiracy, so as to make statements made by them in regard to such information admissible against defendant.
8. Telegrams sent immediately after a murder by a defendant on trial as an accessory before the fact or by those jointly indicted with him as co-conspirators, or by those acting under the authority of such alleged conspirators, were relevant as against defendant.
9. Where it was the theory of a prosecution of an alleged accessory before the fact of the murder of a contestant for the office of governor that the murder was a part of a political plot to intimidate the Legislature, as the trier of an election contest involving the governorship, and where the acting governor was indicted jointly with the defendant, acts and telegrams of the acting governor, as head of the military department, and of the

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military department in general, which reasonably appeared to have been connected with the killing, were admissible against defendant.

10. The words "all right," in telegrams sent directly after the assassination, though having an apparently plain meaning, may, when they constitute a military telegram, be shown by parol to have been used as a part of a cipher code, and to have a meaning different from their face.
11. Where certain letters written by one charged with a crime were introduced against him, it was not competent for him, in his testimony, to explain unambiguous expressions therein.
12. The fact that adherents of a defendant charged with a crime, over whom he had no control, so treated one who testified against him at his first trial as to compel the witness to move away from the vicinity, was not material against defendant at his second trial.
13. Evidence was not admissible on the trial of one accused of being accessory before the fact of murder as to what he said several minutes after he knew of the murder.
14. It was the theory of a prosecution of an alleged accessory before the fact of the murder of a contestant for the office of governor that the murder was a part of a political plot to intimidate the Legislature, as the trier of an election contest involving the governorship. The acting governor was indicted as a co-conspirator with defendant, and the prosecution was permitted to prove the use of the militia by him immediately after the murder. HELD, that it was permissible for the defense to prove, as a reason for such use, that angry and excited crowds were gathering about the executive building, threatening the occupants thereof with violence.
15. While it was permissible for the defense to prove, as a reason for being prepared with the militia, that they had knowledge of armed forces which assembled near the statehouse for the purpose of forcibly ejecting the acting governor and others from their offices, a mere rumor to that effect was properly rejected.
16. Proof of a statement made by a witness out of court, tending to impeach his credibility as a witness, should be admitted.
17. The proper method of impeaching a witness on the ground of the commission of a felony is by proof of conviction therefor.
18. Those who have been indicted as accomplices in the crime for which a defendant is being tried are competent witnesses against him, though the charge against them has not been dismissed; such fact going only to the credibility and weight of their evidence.

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19. C., a witness for the defense in a criminal action, heard G., a witness for the prosecution, make certain statements affecting G.'s credibility. HELD, that it was immaterial that C. on the same occasion loaned money to G.'s brother-in-law.
20. A letter suggesting that the Commonwealth's attorney be apprised that the writer was in possession of information against one jointly indicted with defendant as an accessory before the fact of murder, and a later letter requesting the destruction of the first one, were immaterial, as against defendant, though the testimony of the writer was material, and was used against him.
21. A mandate of reversal of a criminal case was filed with the clerk of the circuit court more than ten days prior to the term of court next succeeding reversal, and notice given defendant that the case would be urged for trial at such term. When court convened, the filing was noted of record. HELD that, the time given defendant for preparation being reasonable, nothing to the contrary being shown, the case would stand for trial at that term of court, though there was no authorization for the filing of the mandate before term time.
22. Cr. Code Prac., section 189, as amended by Act May 15, 1886, provides that a continuance may be refused in criminal cases, despite the absence of defendant's witnesses, without admitting everything as true which is stated as the expected testimony of the absent witnesses in the affidavit for continuance, but that such affidavit must be read as their depositions. Bill of Rights, par. 11, provides that the accused in a criminal prosecution shall have the right to compulsory process for his witnesses. HELD, that the trial of a criminal action can be forced on defendant, though some of his witnesses are absent, where he has been furnished the compulsory process of the court to secure their attendance, and where the affidavit for continuance on account of their absence is allowed to be read as their depositions.
23. The supreme court, when it is not advised as to the condition of the docket of the circuit court, can not hold a refusal of a motion to discontinue night sessions to have been an abuse of the circuit court's discretion in that regard.
24. Where in a criminal action there was evidence which, if given full credit, tended to corroborate the evidence of those charged as co-conspirators with defendant, and to establish his guilt, it was not error to refuse a peremptory instruction to find for the defendant.
25. Under Cr. Code Prac., section 281, providing that decisions upon

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challenges to the panel are not subject to exception, the supreme court has no jurisdiction of an objection to the panel.

26. Where defendant was charged with being an accessory before the fact of a murder alleged to have been a part, or result of a conspiracy, an instruction in regard to acts done in pursuance of a conspiracy "to do some unlawful act" should have further informed the jury what would have been such an unlawful act, under the law and the evidence.

ON PETITION FOR REHEARING:

27. While no provision is made in sections 356, 357, 358, 359 and 360, Criminal Code, regulating appeals, for a rehearing by the defendant in a felony case, and except in cases expressly provided for by statute, a rehearing is not a matter of right, we are of the opinion that this court has, by virtue of its appellate jurisdiction in such cases, power to suspend the issue of the mandate and rehear the case during the term at which it is tried. But if the power is not exercised during the term, the decision becomes final and this court has no jurisdiction at a subsequent term to retry the appeal.

J. R. MORTON, J. C. SIMS AND FENNELL & SON, FOR APPELLANT.

T. C. CAMPBELL, R. B. FRANKLIN, T. B. SEBREE, JOHN K. HENDRICK, B. G. WILLIAMS, VICTOR BRADLEY, L. W. ARNETT, EARL ASHBROOK AND DENNIS DUNDON, FOR THE COMMONWEALTH.

No brief is on file for the appellant and, as the brief of Mr. T. C. Campbell for appellee is altogether in response to the brief of appellant, it is not deemed proper to give his argument especially as it is not accompanied with an abstract of his points and citations.—REPORTER.

OPINION OF THE COURT BY JUDGE O'REAR—REVERSING.

Appellant, Caleb Powers, was indicted by the grand jury of Franklin county, charged with being an accessory before the fact to the murder of William Goebel. On a change of venue in Scott county, he has been twice tried and convicted. On this appeal, numerous questions of law are presented, some of which were considered by the court on the former appeal. 22 R., 1807; 61 S. W., 735; 53 L. R. A., 245. Others now presented do not appear to have been raised, or at

least not passed upon by the court. We do not feel that it would be profitable, or even possible, within reasonable range, to set forth all the facts proven by each side upon the trial. To allow an intelligent understanding of the propositions herein decided, we give a general statement, only, of the facts of the case, and the contentions of the prosecution and of the defense.

The murdered man, William Goebel, was at the time of his death a senator of this Commonwealth, and had lately been engaged in a canvass, as the nominee of his party, for the high office of governor of the Commonwealth. His opponent at the general election held November, 1899, was William S. Taylor, then attorney general of Kentucky. Senator Goebel had attained a commanding eminence and influence in his party—being a leader of great ability, with attributes of most positive and forceful character. These qualities enlisted a devoted following. After one of the most exciting, intense campaigns, the returns of the election showed Taylor's election, and that of all the other State officers on the ticket with him. The Legislature elected at the same time, however, was of the same political faith as Mr. Goebel; a majority of each house being in political accord with him and his supporters. Under the then law, it was provided that a central board of election commissioners should try all contests over State offices, except those of governor and lieutenant governor, which were to be tried by the Legislature. Certificates of election were awarded the Republican candidates. Notices of contest were directly served on all of them. The Legislature which was to try the contest over the offices of governor and lieutenant governor, met 1st of January, 1900. The grounds of contest attacked the validity of the election as held in a number of counties that had given large Re-

publican majorities, based mainly upon an allegation that the official ballots used were thinner than they should have been. The bitterness engendered by the campaign, aggravated by grave charges and countercharges, was thus kept up, and, indeed, apparently augmented. True, appeals were also being made to what was thought to be better reason and patriotism. It appeared that some thought the emergency so grave as to make necessary the consideration of revolution. Whether grounds actually existed for all this is not now so material, as whether they appeared to, and were in fact by many actually believed to, exist. The capital was the center of attention, and the events transpiring were the subject of earnest thought. Naturally and necessarily, many witnesses for each of the contestants were called there. Incidentally many people came, also, whether out of curiosity or interest, or sympathy with one side or the other of the litigants. Appellant contends that it came to his ears, and to the attention of the other State officials, that their opponents and their adherents intended summarily taking possession of the offices upon a favorable decision by the boards and bodies having these cases in hand, without process of law or the judgment of the courts. Whether in fact such a purpose had been formed was not shown at the trial. Of the many expedients resorted to by those in office to influence the action of the triors of these cases, appellant contends that it was determined by him and his colleagues, or at least some of them, to have large bodies of citizens from various sections of the State meet at Frankfort, petition the Legislature as to their rights, and remonstrate against reversing the will of the apparent majority, as expressed by the official returns; thus exhibiting their interest, feeling and wishes, in the hope that it would exert a moral influence

upon the conduct of those bodies. One notably large body of citizens was brought to Frankfort on January 25, 1900, through the efforts of appellant and some of those jointly indicted with him in this case. For the prosecution it is claimed that this crowd of people were brought to the capital armed, to threaten, intimidate, and coerce the action of the Legislature, and, if necessary to accomplish that end, to kill some of the Democratic members, and especially Senator Goebel. The fact of the coming of this crowd, variously estimated at from 500 to 1,200 people, and its conduct, and its purpose in coming to Frankfort, form one of the storm centers of this case. Some days after this crowd, or the great majority of them, had returned to their homes, and before the hearing of any of the contests had been completed by the committees having them in hand, Senator Goebel was shot from ambush, on January 30, 1900, as he was passing through the statehouse square on his way to the capitol building, where the Senate was in session, or was shortly to convene. From this wound he died on February 3d following. It is reasonably certain from the proof in the record that the fatal shot came either from the executive building, or from its immediate vicinity. That building was occupied by the officers of governor, secretary of State, auditor, treasurer, superintendant of public instruction, and bureaus of some of these offices. Appellant had been upon the Republican ticket as the nominee of that party for the office of secretary of State. He had received the certificate of election, and had been commissioned, and was in office. This office was one of those being contested, not before the Legislature, but before the State board of election commissioners. It was the effort of the prosecution to prove, and there was a volume of testimony introduced to the effect, that this fatal shot, and three

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others that accompanied it, came from the office of the secretary of State, and that, although appellant was not at the time in Frankfort, yet that he knew of and was a party to the plot to assassinate Senator Goebel. Within a few minutes after the shooting (whether 5 or 10, or) as much as 30, there is great conflict of testimony), a company of the State guard appeared upon the scene, and were so stationed as to have under their protection the buildings upon the capitol square, and especially the executive building. Also within a few minutes telegrams were sent to the commanding officers of the State guard, calling them to Frankfort. During that day and the following as many as 1,000 of the State militia were under arms in Frankfort. Immediately after the shooting, Gov. Taylor issued a proclamation calling out the State guard. Great excitement prevailed in the city of Frankfort, and fears of a riot were entertained by the officials on the statehouse square, and others, it is claimed. Taylor is indicted jointly with appellant and others for the murder. Other facts bearing on the case, and some elaboration of those outlined above, may be necessary further along, in disposing of the legal questions presented for our decision by this appeal.

The Indictment.

On the former appeal of this case the sufficiency of the indictment was carefully considered by the court, and we were then of the opinion, and are now, that it is sufficient in form and substance. A further discussion of that point is not deemed necessary. See *Powers v. Com.*, 22 R., 1807, 61 S. W., 735, 53 L. R. A., 245.

Affidavit to Require the Circuit Judge to Vacate the Bench.

Upon the noting of record in the circuit court of the filing of the mandate of this court, on the former appeal,

appellant filed an affidavit to require the circuit judge to vacate the bench, and entered his motion to that effect, which was overruled. The judge presided at the trial. The sufficiency of that affidavit is now a question on this appeal.

While at the common law the judge was not disqualified from sitting in any case, only when he was personally interested in the subject-matter or result of a litigation, or was related to those so interested, by statute in this State a materially different rule has been adopted. The present statute on this subject (section 968, Kentucky Statutes) provides: "When, from any cause, the judge of the circuit court fails to attend, or being in attendance, can not properly preside in an action, proceeding or prosecution, pending in said court, or if either party shall file with the clerk of the court his affidavit that the judge will not afford him a fair and impartial trial, or will not impartially decide an application for a change of venue, the parties, by agreement, may select one of the attorneys of the court to preside on the trial, or hear the application, or hold the court for the occasion; and on their failure to agree upon an attorney, the attorneys of the court who are present and not interested, nor employed in the cause, shall elect an attorney of the court then in attendance, having the qualifications of a circuit judge, to hold the court for the occasion, who shall preside accordingly; and the judge so selected shall preside in all cases called during the term in the absence of the regular judge, or in which he can not preside, except in those cases in which the special judge can not properly preside. The election shall be held by the clerk, and in case of a tie, he shall give the casting vote. The person elected shall, during the period that he acts, have all the powers and be subject to all the respon-

sibilities of a circuit judge." The rulings of the trial court on this motion is one of the principal grounds for reversal relied upon in the argument. Questions of this nature are always unpleasant. By law they must first be addressed to the trial judge whom they affect. The anomaly is there presented of one sitting in judgment upon the trial of questions involving, if not his official integrity, certainly his official impartiality. He is required to pass upon them; that is, upon their legal sufficiency, not upon the truth of their statements. From this judgment an appeal lies. The discharge of this duty is necessarily both delicate and difficult. That the sufficiency of the affidavit in this case may be accurately tested, we will undertake a review of the state of the law of this State on that subject.

The common-law rule, formerly in effect here, has been stated. The first enlargement of the right of the litigant in this respect was by the statute of 1815, found in 2 Morehead & B., Kentucky Statutes, 1524, from which we quote: "Be it enacted by the General Assembly of the Commonwealth of Kentucky, that all suits (a) cognizable in any of the circuit courts of this Commonwealth, where either of the parties shall conceive that he, she or they will not receive a fair trial in the court where such suit is pending, owing to the interest or prejudice of any judge or judges of the said court, or the judges will not sit, or to the interest or prejudice of the clerk, sheriff or coroner, where the sheriff or coroner is a party, or to the undue influence of his, her or their adversary or adversaries, or to the odium which attends the said party, or that his, her or their cause of action or defense, though legal, is odious, it shall be lawful for the party so suspecting he, she or they will not receive justice in the court then sustaining the said suit, owing to the said causes, or any of them, at any

time to petition a circuit judge, or the two assistant judges of the circuit courts of this Commonwealth, . . . which petition shall distinctly set forth the cause or causes why such fear is sustained, and be supported by the affidavit of the petitioner or petitioners." It was made the duty of the circuit judge to whom such petition was presented, supported by the affidavits required by the statute, to remove the cause by changing its venue to some other circuit. This application was not considered by the judge against whom the objections were made, but by another circuit judge. The only relief allowed to the litigant when the judge before whom his case was triable was "interested or prejudiced" was to obtain a change of venue from his district in the manner provided in this statute. The law continued so, and without an interruption by this court, so far as we are advised, until the adoption of the Constitution of 1850. The fourth article of that instrument was devoted to the judicial department of the State government. The twenty-eighth section of that article provided: "The General Assembly shall provide by law for holding circuit courts, when, from any cause, the judge shall fail to attend, or, if in attendance, can not properly preside." The Revised Statutes, which became effective on July 1, 1852, carrying into effect the provisions of the Constitution recently adopted, and, compiling the statute law of the State into one system, by section 1, art. 13, c. 27, provided: "When, from any cause, the judge of the circuit court fails to attend, or, if in attendance, can not properly preside in a cause or causes pending in such court, the attorneys of the court who are present, shall select one of its members then in attendance, to hold the court for the occasion, who shall accordingly preside and adjudicate." Other sections regulated the manner of the selection and

the compensation etc., of the special judges. By a subsequent amendment, approved March 9, 1854, attorneys for the parties to the litigation in which the special judge was to be selected were disqualified from voting for such special judge. By section 10, c. 13, Revised Statutes, a defendant in a criminal or penal prosecution, by filing his affidavit with the clerk, stating "that he verily believes the judge of the court where the same is pending will not afford him a fair and impartial trial," could have a substitute, to be selected by the members of the bar, who should try the case, or the motion for change of venue; and, if the defendant filed like affidavit against the substitute, the clerk of the court was required to select "three discreet, impartial housekeepers," to try, under their oaths, the question of the substitute's impartiality.

The first adjudicated case construing the right of a litigant to require the regular judge to vacate the bench upon the ground of his bias, for other cause than personal interest in the result of the litigation, or of kinship to some one so interested, is the celebrated case of *Turner v. Com.*, 2 Metc., 619, decided in 1859. From the array of eminent counsel appearing in the case, and the high professional standing of the appellant, he having been a celebrated practitioner as an attorney at law of his day, the case was doubtless thoroughly presented and carefully considered. This court held that the provisions of the Constitution, *supra*, and of the Revised Statutes (chapter 27, art. 13), applied to a case when the personal hostility of the trial judge to one of the litigants made it improper for him to preside in the cause. The court said: "The Legislature certainly did not intend that any cause, however trivial or unimportant, should operate to disqualify a circuit judge, or render it improper that he should preside in

a case, but obviously meant that such cause should be a legal and substantial one." The affidavit in that case disclosed the following objections to the circuit judge: "(1) That he was personally hostile to appellant and had been so for years, and that, as appellant believed, he could not, because of such hostility, do him justice upon the trial of said case; and (2) that he had prejudged more than one question in the case to appellant's prejudice, and that wrongfully." The court held: "Our conclusion, therefore, is that they did constitute ample cause, rendering it improper for the circuit judge to preside in the case, or to make any order therein, after the objections were presented, further than was necessary to the selection of a special judge in the manner prescribed by law, who could preside and dispose of the case." The court in that case reached its conclusion as to the proper meaning of the general term "any cause," employed in the Constitution and statutes, by referring to the statutes, *supra*, concerning changes of venue, and applying the causes therein enumerated as those evidently contemplated by the convention and Legislature when they used the language under consideration.

Thus the law remained as expressed in the sections of the Constitution and Revised Statutes above quoted, as aided by the interpretation by this court in the case of *Turner v. Com.*, *supra*, until the adoption of the General Statutes in 1873. Section 1 of article 7 of chapter 28 of that revision provides: "When from any cause the judge of the circuit court fails to attend, or, being in attendance, can not properly preside in an action, special proceeding, or prosecution pending in said court, or if either party shall file with the clerk of the court his affidavit that the judge will not afford him a fair and impartial trial, the parties by agreement may select one of the

attorneys of the court to preside on the trial and hold the court for the occasion; and on their failure to agree upon an attorney to try the cause, the attorneys of the court who are present and not interested, nor employed in the cause, shall elect an attorney of the court then in attendance, having the qualifications of a circuit judge, to hold the court for the occasion, who shall preside accordingly." The practice under that section seems to have prevailed, until 1889, of filing an affidavit of the litigant, in which the affiant stated, in the terms of the statute, "that the judge will not afford him a fair and impartial trial." The sufficiency of such an affidavit, and consequently the correct interpretation of the General Statutes mentioned, was presented to this court for determination in the case of Insurance Co. v. Landram, 88 Ky., 433, 10 R., 1039, 11 S. W., 367, 592, decided at the January term, 1889. The court held that it was necessary in such an affidavit that "the fact or facts upon which the belief that the judge will not give the litigant a fair trial should and must be stated in the affidavit, and they must be of such a character as shall prevent the judge from properly presiding in the case." The court, however, said further: "We do not mean to say the statement of the ground for belief must establish, if true, that the judge is a corrupt official, but we do mean to adjudge that such causes, and those of a like character, as have been noticed, are not sufficient, and there must be some fact stated, such as personal hostility of such a character, if that ground is relied on, as would prevent an official of personal integrity from presiding in the case; and of the sufficiency of the affidavit the trial judge must determine, and the question, if improperly decided, can be raised in this court, as in other cases, if an appeal is taken." In that case the affidavit against the judge was filed after many

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preliminary motions had been passed upon, and some or all of the issues joined by the pleadings, and in all probability after the circuit judge had indicated by his rulings in these matters the inclination of his mind as to the law applicable to the case on trial. From the illustrations used by the court in its opinion, it may be inferred that litigants were abusing the privilege accorded by this statute after they had tested the trial court's views concerning the law of their cases by preliminary motions. In the case of *Turner v. Com.*, the court had under consideration a statute using the term "when from any cause" the judge could not properly preside etc. They found that the Legislature must have intended that the causes for which the judge would be required to vacate the bench was one of those provided for a change of venue. In the General Statutes, however, not only is the same language used as was in the Revised Statutes, but there was added these words, "or if either party shall file with the clerk of the court his affidavit that the judge will not afford him a fair and impartial trial." The construction given this section of the statute in the *Landram* case was a strict one. It was the opinion of the court that the Legislature could not have contemplated putting it in the power of the litigant to virtually impeach the regular judge without cause or reason; that it was a right of the other party to the litigation to have his case tried by the regular judge, unless for proper and sufficient reasons he was disqualified. In *Vance v. Field*, 89 Ky., 178, 11 R., 388, 12 S. W., 190, decided at the September term, 1889, the sufficiency of a similar affidavit was under consideration again. In *Insurance Co. v. Landram*, *supra*, was followed and approved, with this explanation or modification: "It was not intended to there decide the judge of the court has the right to put in issue or call in question

the truth of the statement of facts contained in the affidavit, but simply that there must be in the affidavit such fact or ground for belief stated as would prevent an official of personal integrity from presiding in the case, or as would prevent him affording a fair and impartial trial, and, when such affidavit is filed, the statements of fact it contains, and of the belief founded thereon, must be taken as true. Nor was it intended by the opinion to decide that a party may not file an affidavit based upon facts discovered after the issues were formed." *Massie v. Com.*, 93 Ky., 588, 14 R., 564, 20 S. W., 704, was decided September term, 1892—a case which, as we remember, came to this court on appeal a number of times. The sole question involved in that appeal was the sufficiency of the affidavit filed by the accused against the trial judges sitting in the case. In reversing the judgment for the second time, the court stated the contents of the affidavit and its conclusion thus: "Appellant's affidavit discloses the fact that the judge, after the first trial of his case, criticised to divers persons those of the jury that favored the appellant; that he denounced the appellant's case as the most bloodthirsty that was ever committed; that the judge knows that there is a rabid and unhealthy feeling against him in Owen county; and that the judge, in the presence of crowds, expresses, during canvasses for the various offices, the circuit judgeship being one, his opinion as to affiant's guilt—and the judge so rules as to satisfy the bloodthirsty crowds; that he is personally hostile to the affiant." And although there was no error in the record in any other part of the trial, so far as could be discovered by the court, this court, in a most vigorous and characteristic opinion by Judge Bennett, held that, where such facts are made to appear by proper affidavits, the judge should then vacate, and it is reversible error if

he does not. In the case of *Schmidt v. Mitchell*, 101 Ky., 570, 19 R., 763, 41 S. W., 929, 72 Am. St. Rep., 427, the court quoted approving from *Insurance Co. v. Landram*, *supra*, which case was also approved in the *Massie* case, above cited. In the case of *Schmidt v. Mitchell* the only expression of the court as to the sufficiency of the affidavit there, or as to the averments of the affidavit, was as follows: "A careful examination of the affidavit filed in this case shows that the averments are based almost entirely upon hearsay, and that it is not drawn in conformity with the rule laid down in the *Landram* case *supra*. We do not feel authorized to hold that in deciding this affidavit to be insufficient, there was an abuse of judicial discretion by the trial court." Counsel for appellee have obligingly copied into their brief, as an appendix, what they say is, and what we assume to be, a copy of the affidavit referred to by the court in the language just quoted. The other facts appearing in the *Schmidt* case are not shown in the opinion or in the affidavit further than was necessary to decide the other questions disposed of by the court. It would appear that this affidavit was filed long after the court had ruled upon many of the questions presented by various motions and pleadings, and had thus indicated pretty conclusively the views of the law applicable to the case. It should be borne in mind, too, that *Schmidt v. Mitchell* was in equity, where every ruling of the chancellor, and his every finding of fact, were subject to review and reversal on appeal, and where, consequently, his bias, if it existed, was comparatively harmless—not affording the opportunities for irremedial wrong so forcibly expressed in the *Massie* case.

It is insisted for appellee that the case of *Schmidt v. Mitchell* virtually overrules *Massie v. Com.*, that *Massie*

v. Com. had virtually overruled Insurance Co. v. Landram, and that Insurance Co. v. Landram was a material departure from, if not in conflict with, Turner v. Com. As a matter of fact, Insurance Co. v. Landram quotes approvingly and relies upon Turner v. Com. It does seem to be an extension, or at least an elaboration of the principles announced in Turner v. Com. Massie v. Com. explicitly cites and relies upon and approves Insurance Co. v. Landram. It can not be said to overrule that opinion. Vance v. Field seems to modify, or at least to explain, Insurance Co. v. Landram. Such an important line of cases apparently so thoroughly and carefully considered will not be held to be overruled by an opinion containing such general terms as are in Schmidt v. Mitchell. The better course, and we believe the true one, is to read all these opinions and the statutes together, in the effort to arrive at what has heretofore been held to be, and what in accordance with such holdings is now, the law of this State upon this subject.

In addition to the opinion above mentioned the case of Givens v. Crawshaw, decided March 17, 1900, reported in 21 R., 1618, 55 S. W., 905, is applicable and clearly in point. In that case the affidavit against the judge, the Honorable M. J. Moss, of the Bell circuit, was that the said judge would not afford the affiant a fair and impartial trial, because of their political differences, and because the affiant had voted against the judge and for his opponent, and took an active part in the election, and since the election the judge had threatened that all who had bolted from his party in that election would have a hard road to travel, etc. The case of Insurance Co. v. Landram was again referred to and relied upon in the opinion, and while it was in this opinion conceded that the statute simply required the affiant to state that he does not believe the judge will afford

him a fair and impartial trial, yet the additional facts required by the Landram case, *supra*, to be stated, were held to be necessary. Said the court: "We do not think that it is necessary in all cases, or at all, in fact, that the affiant should state facts which tend to show that the judge was intentionally unfair, or that he would knowingly disregard the law or the evidence, to the prejudice of the affiant. It may, however, sometimes happen that conditions or circumstances are such that the perfectly honest and competent judge would in fact be unable to afford a litigant such an absolutely impartial trial as the law intends and requires. In the case under consideration the facts stated in the affidavit do not import intentional unfairness or wrong, but, if true, they might create an impression upon the affiant that the judge, however honest and pure his intentions may be, had become so prejudiced that, imperceptibly to himself, he would be unable to give a fair and impartial trial." The court held the refusal of the judge to vacate the bench was error, and the judgment was consequently reverse.

With the wisdom of the enactment of such a statute we have nothing to do. That is a question solely within the province of the law-making body of government. Nor can the fact that some litigants abuse this privilege of the statute, and do so to the great injustice of the trial judges and the adverse party, influence a fair interpretation of the law as it is. Many statutes are abused, but we never feel justified in declaring that they are inoperative because of that fact. The Legislature doubtless saw, and, in the experience of many years that this law had been upon the statute books of this Commonwealth, may have been confirmed in the belief, that it was necessary to the just protection of the rights of litigants, and to an absolutely fair

and impartial administration of justice through the courts, that such statute should be in existence; that such a right should be available to the litigant, where the facts justified its employment. From this statute, and the decisions quoted from, the law may be gathered to be, if a litigant files his affidavit, stating that the judge will not give him a fair and impartial trial, and states therein the basis of such belief, and if the facts so stated are such "as would prevent an official of personal integrity from presiding in the case or as would prevent him from affording a fair and impartial trial," then the truth of the statement of the facts as set out in the affidavit must be assumed for it cannot be traversed or tried.

Applying the law thus epitomized to the affidavit in question in this case, we find that appellant in that affidavit charged, in substance and effect, as follows, so far as the facts charged were material or relevant: That the trial judge was of the same political faith as the decedent, William Goebel, was his intimate personal friend, and in close sympathy with him in his contest for governor, and that by reason of those circumstances, and the intense political excitement existing at the time of the assassination of Senator Goebel, the judge had conceived and entertained a feeling of hostility and prejudice against the accused that would prevent his affording a fair and impartial trial of the case. Numerous circumstances are recited, alleged to have occurred on the former trial of the case, indicating the existence of the feeling alleged. Among other matters specifically charged is the one of the manner of selecting the jury so as, it is stated, none but intense partisans, in sympathy with the prosecution, were selected, "said judge well knowing their bias and prejudice against defendant

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[i. e., the jury commissioners], and believing they would be governed by their political prejudice and hostility to defendant in the selection of names for said wheel." In other words, the affidavit charges that the trial judge, on account of an intimate friendship for the murdered man, a partiality for his cause and course, and on account of his hostility and prejudice against the accused, would not afford or allow him a fair and impartial trial, and in pursuance of such hostility had actually taken such steps as would result in his being tried by a jury prejudiced against him, and selected for that purpose. The facts upon which the alleged hostility was based, and its causes, are set out with much particularity. If the facts alleged in the affidavit are true, they clearly bring the case up to the requirements heretofore laid down by this court in making out a sufficient case under this statute. We do not mean to be understood as saying that a judge of one political faith may not properly try the case of a litigant of a different political faith, though the question involved was one purely political. Nor is the mere fact of a difference in political belief or affiliation a legal ground for objecting to a trial judge. We do not believe (such has not been our observation or experience, nor has such been the history of the judiciary of this State) that the judges' political views control their decisions upon matters of law before them for adjudication. It will be a most calamitous day for the Commonwealth when such comes to be the case. But cases may arise (it is easy to conceive of them) where a judge may become disqualified in fact and in law, by an undue bias, from properly presiding in a case that has grown out of a political controversy, as well as any other controversy. It was so held by this court, and explicitly applied, under allegations no stronger, if as strong, nor more definite,

than here, in the case of *Givens v. Crawshaw*, supra. If the fact be that the judge is biased or prejudiced against a litigant because of politics, it would seem to disqualify him as certainly and completely as if he were prejudiced or biased against him for any other reason. The objection is a state of bias which destroys impartiality, whatever may be its cause. Nor does such a state of case necessarily imply corruption on the part of the judge, or that he would knowingly disregard the law or the evidence. As said in *Givens v. Crawshaw*: "It may, however, sometimes happen that conditions or circumstances are such that the perfectly honest and competent judge would in fact be unable to afford a litigant such an absolutely impartial trial as the law intends and requires."

We have so far discussed this question, as all the authorities quoted and cited require, upon the hypothesis that the facts stated in the affidavit were true. We are far from intending to be understood as giving our assent to their truthfulness. It would be both improper and unjust to do so. Beside the legal presumption of official integrity attaching, the long and distinguished official career of the learned trial judge who presided in this case would arrest the judgment and comment of all at the point where the law limits them as necessary functions in trying the exact question involved. By express declaration of law the judge can not controvert the statements of the affidavit. In argument, counsel for appellee assert that the affidavit is untrue. In the *Turner* case and in *Vance v. Field* and in *Givens v. Crawshaw*, cited, the trial judge in each instance controverted of record the truthfulness of the affidavits. But in each instance, also, their sufficiency was tested by their own averments, and without regard to the judge's traverse. As a rule, prejudice is honest,

and bias may be innocent. In the very nature of the case, therefore, it is extremely difficult, if not impossible, for the mind so affected to realize, much less to judicially try, its own impartiality. It may also be true that the trial judge, selected by his constituents presumably upon their faith in his probity, whose official integrity, as it were, is thus assailed by a litigant whom he may not know, and for whom he may have no personal regard one way or the other, may be compelled to try the sufficiency of such allegations in an affidavit which, in his conscience, he may know to be unfounded and utterly false. The arguments here naturally first coming to mind, and, indeed, those principally employed by appellee in this case, go to the question of the wisdom or propriety of the statute. If the court felt at liberty to reconsider the rule laid down in all the other cases cited (which we do not), we might feel persuaded that it were best to rest such questions upon the express words of the statute, leaving all questions of propriety, probable abuse, and overbalancing benefit to the consideration of the Legislature, where they belong. We conclude that the trial court erred in not vacating the bench upon the motion and affidavit discussed.

Rulings on Admitting and Refusing Evidence.

As the learned trial judge pursued in the main a consistent course of ruling on the relevancy and competency of evidence offered, it is deemed unnecessary to take up each objection separately, and to pass upon it specifically. Instead, examples of a class will be selected, where practicable, and the rulings upon the retrial will be made to conform to the line suggested in this opinion.

As has been stated, it was the effort of the prosecution to prove that the large party of men who came to Frank-

fort January 25, 1900, had as their purpose the intimidation of the Legislature by force and violence, which would, of course, have been unlawful, and that it was in execution of this purpose that Senator Goebel was shot by some member of that party, or by some person acting with them. It was therefore proper to show the real purpose of this assemblage of people. In order to do this, what they did and said at the time was relevant. Evidence of that character was properly admitted by the trial court. This crowd was gathered mainly from the southeastern part of the State from what are termed "mountain counties," the votes of some of which were particularly the subject of the pending contests. It is therefore that this crowd of people were generally spoken of as "mountain men" or "mountaineers." It was in evidence, also, that numerous men from substantially the same section had been at Frankfort, and continued to be, throughout the contest. These latter, in some instances, were not shown to have been a part of the large crowd of the 25th of January.

The testimony of Eph Lillard as to an occurrence at dinner at the Board of Trade Hotel on January 25th when one of these parties "sweetened his coffee with a forty-four," is relevant, if the person testified about was identified as one of those who came in the crowd mentioned. We understand this witness to have so identified this man, in which event the testimony was properly admitted. In other words, we hold that statements made by members of this party of January 25, 1900, gotten together by Powers, or by others under him, or by those jointly operating with him, made at a time when they were acting in the consummation of the purpose of their coming to Frankfort, or made in the furtherance of such purpose, and of acts done by them, when they are identified, not necessar-

ily by name or place of residence, but as a matter of fact, as having been members of such party, are relevant. This observation, of course, applies to other parties that were procured under similar circumstances; it being asserted by the prosecution that there were one or two other such.

On the other hand, we hold, as was held on the former appeal, that statements made by unknown and unidentified persons at Frankfort or elsewhere, or even by persons known and identified, but not charged jointly with the accused in the perpetration of this crime, where such persons are not known to have been acting with the accused, or some of those jointly indicted with him, in the plot to assassinate Senator Goebel, or to do violence to members of the General Assembly in general, are not competent against appellant. The statements and acts of this last class of persons must be held to be their own acts alone. The whole doctrine of allowing the acts and declarations of a conspirator as evidence against a co-conspirator is based upon the theory of agency. It is elementary that the agent may not, by a mere declaration or averment out of court, prove his agency, so as to bind the reputed principal. Nor can recitations made by such agent after the termination of the agency, or while not engaged therein, being in their nature historical or reminiscent (that is, declarative of a past fact), be relevant as against the putative principal. His declarations, however, made in the prosecution of the enterprise in hand, given in his charge by his principal, are regarded somewhat in the nature of the *res gestae*—as being verbal parts of what he is doing. So what the agent says in furtherance of his principal's cause, which is a part of it, and to help it along to a consummation, is relevant. All the authorities agree (those cited by appellee and those by appellant) that the declar-

ations of an accomplice, to be admissible as evidence against his co-conspirator, must be such either as to form a part of the *res gestae*, or be in furtherance of the criminal project. Wright, Cr. Consp., 218, etc.; Spies' Case, 122 Ill., 1, 12 N. E., 865, 17 N. E., 898, 3 Am. St. Rep., 320. And see authorities on this point in former opinion. The word "furtherance" had a well-defined and generally accepted meaning, which is "the act of furthering or helping forward, or promotion or advancement."

It is attempted to justify in argument the admission of disconnected statements of persons who are not shown to have had any connection at all with appellant, or any of those jointly indicted with him, by merely showing that they visited the statehouse square during the contest proceedings, and had access to, and opportunities for conversation with, then Gov. Taylor, appellant, and others who are jointly indicted with them. It may be assumed as a fact that a great many people in this State, of undoubted personal integrity, sympathized politically with Gov. Taylor and his associates upon that ticket in their race for their respective offices, and that they likewise sincerely believed that Taylor and his associates had been really and fairly elected; that consequently they earnestly hoped that they might retain their respective places, and to that end they gave these officials the benefit of their encouragement or presence or advice. The same thing may be said, and be equally true, of the adherents of the other side, with respect to their candidates and their causes. Nothing criminal, nor even reprehensive, in the eye of the law, can be imputed to such conduct. These facts alone, however, do not in any sense constitute, or tend to show that there was, an unlawful conspiracy by these parties to commit crime. For these reasons, we think the testimony of witnesses

Judge Hazelrigg, Ray, Barlow, Rosseau, Stivers, Miles (in rebuttal), and Armstrong irrelevant, as against appellant. To have knowledge of a crime, it is not necessarily implied that one possessing such knowledge is a party to it. The utmost that is apparent concerning the testimony to J. W. Ray and Judge Hazelrigg as to communications made to them by Guffy, and similar testimony of other witnesses on like points of evidence, is that Guffy and such other witnesses had information of such facts as induced them to believe that Senator Goebel would be killed. Such information would not necessarily make its possessors parties to the plot to do the killing nor does it, alone, tend to prove that they were parties to such a plot.

A number of telegrams were introduced, some of which were signed by Collier, some by Reynolds, Sharp, Denny, and various others, all written and sent directly after the assassination of Senator Goebel. In so far as such telegrams were sent by appellant, or any of those jointly indicted with him, or who were shown to have been acting under and by authority of appellant and such persons jointly charged with him, we are of opinion that they were relevant; otherwise not.

As to telegrams sent by Collier and others in the military service, and sent immediately after the assassination, as well as other acts done by the military immediately after the killing, and so nearly connected therewith as to be a continuation of what was then transpiring, we think they are properly admissible. At the time of the killing, Wm. S. Taylor was the acting governor of the Commonwealth. As has been stated, he has been indicted jointly with appellant, as an accomplice. Under the rules of evidence, what he did, if anything, at the time, and prior to the killing, that was in furtherance of the alleged plan to

kill Senator Goebel, is relevant on this trial of appellant, under the principles already discussed. Consequently his orders and directions to the State militia, in so far as they had, or reasonably appeared to have had, connection with the event of the killing, under the theory of the prosecution, was properly admissible. And it is under this head that the Collier telegrams were admissible. In this connection it was shown that, directly after the assassination, Gen. Collier sent telegrams to Col. Williams, of the 2d regiment, and Col. Mengel and Lieut. Col. Gray of the 1st regiment, worded, "All right." In response to these messages, these commanding officers brought their regiments forthwith to Frankfort. The defense offered to prove by Gen. Collier, who was adjutant general, and in command of the militia of the State, whether in the sending of such messages he used a military code or signal previously agreed upon between him and his subordinate officers, and, if he did, to explain what the words used were agreed to represent, or what meaning it was agreed that they should convey. This was objected to by the prosecution, and the objection was sustained upon the idea that the words used had a plain meaning, and that the written telegram could not be varied or explained by parol testimony. Ordinarily the rule is that unambiguous writings offered in evidence can not be explained or changed by parol testimony. But it is the very essence of all code or cipher arrangements for transmitting intelligence that the words actually employed should have a different meaning from that accorded to them by general use. It is not unusual (indeed, it is understood to be the custom) to employ code or cipher forms for transmission of messages in military operations. We know of no rule that requires such code or cipher agreement to be in writing. If it is understood by the parties

to be affected, its purpose is served. Therefore it was competent to allow those acquainted with the code or signal or cipher agreed upon to explain what the words actually used had been agreed upon as representing. It also should have been allowed to be shown when such signals or cipher had been adopted by the adjutant general's office, for what employed, what it signified, and when and on what occasions to be used. We are of the opinion that the words "All right," as employed in these telegrams, were ambiguous; that is, of doubtful meaning, or susceptible to two or more constructions.

Certain letters written by appellant were offered in evidence against him. He offered to explain in his testimony what he meant by certain expressions contained in the letters. This was overruled. We think, properly so. The meaning of a writing, where its terms are not ambiguous, must be gathered from the writing itself.

These letters fall within that rule. The court allowed the witness Prof. Stephens, in testifying for the Commonwealth, to explain why he wrote certain letters to appellant. The reasons for writing his letter do not appear to have been all disclosed to appellant at the time. Such reasons are not material, for they appear to have been, at best, but suppositions of the witness, based upon general rumors.

This witness (Prof. Stephens) was asked if the reason why he had left his former home, Barbourville, was not because appellant "and his adherents in that locality" had so treated him and behaved towards him as to make his removal necessary. The witness exculpated appellant from participation, but answered the remainder of the question in the affirmative. This alleged treatment is said to have occurred after appellant's first trial. It clearly can not be charged to appellant that other people, of whom he had no

control, a year or more after the commission of the crime for which he is being tried, had mistreated a witness for the prosecution.

George W. Long and other witnesses were asked as to what appellant said directly after the information was conveyed to him of the killing of Senator Goebel. It was shown that this was some minutes after the news had been communicated to appellant. The court rejected this evidence, and we think properly so. It could not have been a part of the *res gestae*, and there is no rule of evidence with which we are acquainted under which it could have been admitted.

The evidence of C. M. Barnett for the defense, appears to us to be immaterial.

The opinion on the former appeal sets out that the real purpose of the crowds who came to Frankfort during the time of the contests, so far as such crowds were brought or induced to come by appellant and those jointly charged with him, was relevant, and might be shown. This includes, as has been stated, what such crowds or their members did and said in furtherance of the object of their coming. And the use of the militia immediately following the assassination of Senator Goebel being proved, it was permissible to prove also that they were called out for a proper and lawful purpose, if such was the fact. Therefore, when the defense offered to prove that it was a fact that there were angry and excited crowds gathering about the executive grounds, threatening the occupants of the executive buildings with violence, and that statements of members of these crowds were incendiary in their nature, and that, from the appearance, demeanor, or threats of such crowds of their members, riot appeared imminent, these facts were clearly relevant. It was also offered by the de-

fense to prove, but the court rejected it, that there was a common rumor current in Frankfort at that time that a large body of armed men frequently assembled in the buildings near the statehouse for the purpose of ejecting, and intending to forcibly eject, the Republican officers from their offices. It was the purpose, evidently, of the defense, to show the existence of these general rumors as a justification for their being in readiness with the militia to protect themselves in their offices. We are of the opinion that whatever knowledge or direct information was possessed by the executive authorities concerning these matters was competent. The trial court seems to have so ruled. But mere rumors should not be admitted.

A witness for the prosecution (Wharton Golden) is alleged to have made a statement to R. L. McClure affecting the credibility of the said Golden as a witness. This is the conversation that is alleged to have occurred near the Phoenix Hotel in Lexington. The defense offered to prove this statement of Golden's by witness McClure, and was refused. We are of opinion that this evidence should have been admitted. We think the admissibility of other evidence objected to may be tested and regulated by the foregoing.

The testimony offered by S. H. Stone to prove that a witness for the Commonwealth (Culton) had defaulted or been guilty of embezzlement was properly rejected. The method of thus impeaching a witness is to prove his conviction under such charge. See *Howard v. Com.*, 110 Ky., 356, 22 R., 1807, 61 S. W., 756, and cases there cited.

Objection was made to the competency of the witnesses Golden and Culton, indicted as accomplices in the crime for which appellant was being tried, because the charge against the said witnesses was not first dismissed, and because to permit them to testify for the Commonwealth, under the

circumstances, was, in effect, to make their own immunity dependent upon the effectiveness of their service to the prosecution. The majority of the court is of opinion that these witnesses were competent. The question of their credibility and the weight to be accorded to their evidence is to be determined by the jury in the light of all the facts and circumstances.

Rev. Cody testified as a witness for the defense concerning certain alleged statements of the Commonwealth's witness Golden, which affected the credibility of the latter. On cross-examination, Rev. Cody was asked if he had not on the occasion in question, loaned some money to Mr. Stamper, to whom he says he was then making a pastoral call. Stamper was a brother-in-law of Golden. The witness was required to answer, and said that he had. We are of opinion that this evidence was immaterial, and improperly admitted. Upon precisely the same grounds the evidence offered that Ed. Steffy had tried to borrow money from supposed friends of appellant was irrelevant, and was properly rejected.

Walter Day wrote to C. B. Hill that he possessed certain information of value to the prosecution, as against Youtsey, and suggested that the Commonwealth's Attorney be apprised of the fact, so that he would be summoned. He later wrote, asking Hill to destroy the first letter. Day's testimony was prejudicial to Youtsey, and was used on this trial; Youtsey being jointly indicted. The letters, however, appear to be wholly immaterial, and therefore irrelevant as evidence against the accused.

Did the Action Stand for Trial at the First Term at Which
the Mandate of Reversal was Noted of Record?

After the reversal of the former judgment in this case,
and more than ten days before the next succeeding term

of the Scott Circuit Court, the attorney for the Commonwealth filed in the office of the clerk of the Scott Circuit Court the mandate of this court reversing the former judgment, and also caused to be served upon appellant and upon his counsel notice to the effect that such mandate had been filed, and that the Commonwealth would urge a trial of the case at the succeeding term. When the court convened the filing of the mandate was noted of record. Appellant objected to the trial at that term because it is insisted for him that the case did not then stand for trial, but that it would be for trial at the succeeding term; that the Scott Circuit Court did not regain jurisdiction over the case until after the filing of the mandate had been noted of record in open court. There is no provision in the Criminal Code of Practice for filing a mandate of the reversal in the clerk's office and given notice to the adverse party more where the accused, who had been sentenced to a term in the penitentiary, had not caused the judgment to be suspended, but had been carried to the penitentiary in the execution of the judgment. In that state of case is provision made for filing of the mandate out of term time, and for proceedings thereon. Nor is there anything in the Criminal Code of Practice which would prevent the circuit court from proceeding with the trial of the accused at the same term at which the mandate of the Court of Appeals reversing the former judgment had been filed. The question, of course, would be presented, whether the accused had had reasonable opportunity since the reversal to prepare his case and procure the attendance of his witnesses. The Commonwealth's Attorney in this case followed the provisions of the Civil Code of Practice on this subject, wherein a provision is made for the filing of the mandate in the clerk's office and giving notice to the adverse party more

than ten days before the beginning of the term, in which event the case would stand for trial at that succeeding term. The court is of the opinion that the case stood for trial at the term of the court during which the filing of the mandate was noted of record, subject to whether the parties had been afforded reasonable time and opportunity to prepare for trial. The service of the notice in this case was acted upon by appellant and his counsel with expedition, and they had furnished to them all the process that the court could have awarded them, and, in our opinion, had reasonable opportunity and time to have prepared for trial. At least, the contrary is not shown.

An affidavit for a continuance was filed by appellant because of the absence of numerous important witnesses. Many of these witnesses actually appeared at the trial, and the affidavit was allowed to be read as the depositions of those absent. After the accused had been afforded the process of the court, and had employed it without avail, his witnesses being absent at the trial, the court could only reasonably do two things: One was to allow the affidavit to be read as the depositions of the absent witnesses, and the other was to award an attachment for those who had disobeyed the subpoena. Both of these the court did in this case. We are unable to see that appellant was not afforded a reasonable and fair opportunity to present his case in this respect.

It is then contended for appellant that the affidavit should have been read as true. The Criminal Code provides that this shall be done only when the trial occurs and is forced at the indictment term; that is, the term of the court at which the indictment is returned. There is no provision for its being done otherwise, except that the trial court may, when, from the nature of the case, the

ends of justice require it, grant a continuance unless the attorney for the Commonwealth will admit the truth of the facts which it is alleged in the affidavit such absent witnesses would testify to. Act 1886, amending section 189, Criminal Code Practice. In construing this act, this court, in *Adkins v. Commonwealth*, 98 Ky., 539; 17 R., 1091; 33 S. W., 948; 32 L. R. A., 108, held it to be not violative of that section of the Constitution found in Bill of Rights, par. 11, to-wit: "In all criminal prosecutions the accused has the right to be heard by himself and counsel; to demand the nature and cause of the accusation against him; to meet the witnesses face to face, and to have compulsory process for obtaining witnesses in his favor,"—to force a trial of one accused of crime, although some of his witnesses were absent, if the affidavit for continuance was permitted to be read as the evidence of the absent witnesses, subject to competency, relevancy, etc., provided the accused had previously been furnished the compulsory process of the court, and allowed a reasonable opportunity to procure the attendance of his witnesses. The "compulsory process" means not only the ordinary subpoena, but a warrant of arrest or attachment for such witnesses as failed to obey or avoided service of the first subpoena or recognizance.

Night Sessions.

A motion was entered by appellant to discontinue the night sessions, which was overruled. The regulation of its hours of session must, from the nature of the case, be left largely within the discretion of the trial court. It alone knows the condition of its docket, and the demands made by the matters before the court upon the time allotted by statutes to the term. Unless such discretion has been man-

ifestly abused, to the prejudice of appellant, this court will not interfere. We can not say in this case that there has been such abuse. We are not advised as to the condition of the docket of the Scott Circuit Court at that time. The court subjected both sides, and its judge, to the same treatment, apparently, as to working hours.

The Pardon Issued by W. S. Taylor.

It is again argued that the pardon issued by Wm. S. Taylor, professing to be acting as governor of the Commonwealth, on the 10th day of March, 1900, remitting the penalty, and pardoning appellant of this crime, is good, at least as the act of a *de facto* officer: that Taylor was then actually in possession of the office and archives, and was exercising the prerogatives of the office of governor, and as such *de facto* officer his acts, as between all others, are valid. This question was also fully and carefully considered by the court on the former appeal; and the ruling then made, for the reasons then assigned, is adhered to.

The Motion for Peremptory Instruction.

At the close of the evidence for the Commonwealth, and again at the conclusion of the trial, appellant moved for a peremptory instruction to the jury to find him not guilty, based upon the idea that there was no competent evidence, other than that of those charged as co-conspirators, connecting him with the commission of the crime for which he was being tried. The rule early adopted and persistently adhered to by this court in criminal cases, where there is any evidence tending to establish the guilt of the accused, is that the question is one for the jury. Of course, it follows that if there is no evidence, or no competent evidence, which is the same thing in law, against the accused,

he would be entitled to a discharge. And under the Code, if the evidence of those charged as co-conspirators was not corroborated, he would likewise be entitled to a discharge. In the argument of appellant's counsel under this head, the correctness of the foregoing is admitted. To show that there is no evidence against the accused, resort must be had to, and in the able and earnest argument made in behalf of appellant the effort is made to meet this rule by an analysis of the evidence for the Commonwealth, in which probability, verity and veracity are discussed. This very argument concedes that there is evidence, if credited, that would operate to take the case to the jury. The weight to be given to evidence and the credibility of the witnesses is always a matter for the jury. If full credit is given to the testimony of the Commonwealth's witnesses, such a case is made out as, under the rule stated, we could not, without an invasion of the well-established province of the jury, order the case taken from them. Nor should this court be tempted to do so even by the argument that the violent passion of the jury may result in a particular instance in the miscarriage of justice. However, as in times of high excitement, juries may err upon one side or the other, it is believed that the greatest safety to our institutions, and the best guaranty of the citizens' liberty, lie in the careful and faithful preservation to its fullest extent of this ancient right of the English-speaking people. The motion was properly overruled.

The Jury.

Objections were made by affidavit and motion to the manner of selecting the jury in this case, and to the venire because of its bias. The charges made are of a most serious import, if true. But it is proper to state that they

are controverted, except as to the fact of the political affiliation of the panel summoned in the case. It should not be said, and it can not be true, that per se a Democrat is disqualified from fairly trying a Republican charged with crime, or *vice versa*. If men should be selected as jurymen whose prejudices would be relied on to procure a conviction or acquittal of one whom they are trying, charged with crime, we are fully persuaded that the fact of the politics of such jurymen would not be the cause of such selection. It would be the character of those so selected. But it has been held (*Terrell v. Com.*, 13 Bush, 246; *Kennedy v. Com.*, 14 Bush, 342; *Forman v. Com.*, 86 Ky., 606, 9 R., 759, 6 S. W., 579) that objection to the panel of the jury shall not be subject to review by this court. It is the opinion of the court (a point upon which, however, we have not been in entire accord) that under paragraph 281, Cr. Code Prac., this court has no jurisdiction to pass upon these questions. In the opinion of some of the members, when jurisdiction is conferred upon this court of this class of cases it is not competent for the Legislature to limit the court as to what errors it may reverse for, or as to what shall not be subject of reversal; that to so allow is to leave the propriety and legality of the proceedings in the court to legislative, and not judicial, control. The majority of the court adheres to the former rulings on this subject. The manner of selecting the jury, except as regulated by statute, is within the control of the trial court. To its sense of fairness and desire to dispense that justice in trials whose essence is impartiality, this question must be left.

Instructions.

The court can but reiterate what was written in the former opinion in this case as to proper instructions to have

been given to the jury. In that opinion some criticism was made of the failure of the court to clearly define the phrase, "for the purpose of doing an unlawful or criminal act." In the fourth instruction given on this trial the court seems to have defined such purpose to have been that of killing a member or members of the Legislature of which William Goebel was a member, but in the seventh instruction given to the jury the court adds no such qualification or explanation to the phrase; the jury being told that if appellant and those jointly charged with him, or any of them, "conspired to do some unlawful act, and in pursuance thereof," etc. Nowhere in this instruction is it stated what the unlawful act was, but the determination of that matter, both as to the fact and the law of it, seems to have been left to the jury. The court is of the opinion that the trial court should have instructed the jury in this instruction, as in the fourth, what would have been such an unlawful act, within the contemplation of law, and as was embraced by the evidence allowed to go to the jury.

For the reasons indicated, the judgment is reversed, and cause remanded for a new trial under proceedings not inconsistent herewith.

Dissenting opinion by Judge Hobson, in which Judges Paynter and White concur:

The pivotal question in this case is whether the circuit judge should have vacated the bench on the affidavit filed by the defendant. In refusing to do so, he followed the decision of this court in the case of *Schmidt v. Mitchell*, 101 Ky., 570, 19 R., 763, 41 S. W., 929, 72 Am. St. Rep., 427. In that case the affidavit was substantially the same as that filed in this case. It was held insufficient, and the refusal of

the circuit judge to vacate the bench was sustained. That opinion was written by Judge Du Relle, and was concurred in by the entire court. It followed the cases of *Insurance Co. v. Landram*, 88 Ky., 434, 10 R., 1039, 11 S. W., 367, 592, and *Vance v. Field*, 89 Ky., 178, 11 R., 388, 12 S. W., 190, and has since been regarded as settling the question in the State. The case of *Massie v. Com.*, 93 Ky., 588, 14 R., 564, 20 S. W., 704, was distinguished by the court from these cases, and not intended to lay down a different rule. We see no reason for disturbing a rule so well settled, for justice can not be administered properly if the rule on this question is uncertain. There are sound reasons for the rule thus declared. Otherwise the regular judiciary of the State may be displaced on the second trial of any case when the ruling of the judge on the first trial does not suit the litigant. Substantially the same ground of objection might have been made by appellant to a large number of the circuit judges of the State, and the rule now adopted by the court is, in substance, an overruling of the cases above referred to.

In order to a proper understanding of the exceptions to the rulings of the court in the admission and exclusion of evidence, and their bearing on the case, it will be necessary to state in a general way the facts established by the proof. For convenience, these will be grouped under the following heads:

(1) Where was the shot which killed the deceased fired from? The east building in the Capitol Square is known as the "Executive Building." On the first floor of this building, on the south side, at the west end, is a small room, known as the "Private Office of the Secretary of State." This room has a door opening into the hallway, and one opening into the room on the east, called the "Reception Room." East of this room is the governor's office, and

wealth when shot, and also to show that the shot came from the space between the Executive building and the center building. But the witnesses who located the place where the deceased fell as further south were some distance from him and to the south of him, and had nothing by which they could determine accurately how far he was from them, and they might naturally make a mistake in thinking that he was nearer to them than he was, as he was walking away from them; while the testimony for the Commonwealth is by persons who were with the deceased, or picked him up after he was shot, and those to the right and left, who observed certain obstructions between him and them, and thus identified the point beyond question. The proof, too, about the shot coming from between the buildings, is equally uncertain, and is met by the positive testimony of a reputable witness who was standing there at the time in this space, and testifies that the shot was not fired from there, but the sound came from around the corner, in the direction of the window referred to. In view of the facts, it is submitted that he who will not believe, under the testimony, that the shot which killed the deceased came from the window of appellant's private office, would not be persuaded, though one rose from the dead.

(2) Was the deceased killed pursuant to a conspiracy? The shooting occurred in broad daylight, just in front of the capitol of the State, when the Legislature was assembling. The shot was fired from the private office of the secretary of State, in the Executive building, in which were the offices of the executive officers of the State. Can it be believed that an assassin, single-handed and without accomplices, could have done such a thing and vanished without immediate detection? Beside the fact of Youtsey's

bringing the crowd of men over, above referred to, it is shown in the evidence that on previous days there were always a number of persons, belonging to the crowd that appellant had brought to Frankfort, in front of the capitol buildings about this time. On this morning there was none. Just after the shooting, men with guns in their hands were stationed at the entrance to the Executive building, to prevent persons from coming in. That morning at the arsenal a company of militia, which had been there for some days, were for the first time issued ammunition and overcoats, and kept in line; and these, a very few minutes after the shooting, were marched to the statehouse. Other circumstances might be mentioned, but it is unnecessary to extend this opinion by setting them out, for it is manifest that the thing had not only been carefully planned, but that it could not have happened as it did except as the result of a well-laid conspiracy.

(3) Was the defendant a party to the conspiracy? Appellant was not in Frankfort at the time of the assassination. He was on the train going to Louisville. If he had been in his office, the shot could not have been fired from it without his being directly involved. His absence at that time gave opportunity for its execution. The assassination was on Tuesday. On the Saturday before, Powers saw Youtsey sitting at the window referred to. He had the window raised six or eight inches, with the curtain down, and with a gun pointed out of the window, and said trouble had started. The witness who testifies to this was the governor's private secretary. He said he did not see any signs of trouble. Youtsey then said if trouble started he was going to be prepared. On the following Monday, appellant, Caleb Powers, and his brother, John, were thinking of going to Louisville. Youtsey asked John

to give him the key to this private office. John gave him the wrong key. The next morning, before Caleb Powers and John started to Louisville, they came to the office, and Youtsey met them in the hall. He had an angry conversation with John, and finally John gave him another key. After this, Caleb and John Powers went to Louisville together. This key Youtsey evidently used to enter this office, raise the window as he had done on Saturday, and lower the blind as it was seen just before the assassination, for he entered through this door, and the door next to the reception room was locked; and he was given this key after he had more than once declared that the way to settle the contest was with steel cartridges, and after appellant knew what had occurred on Saturday. Appellant, on getting to Louisville, took the first train to Frankfort, and, when he got there, jumped off the train while running, in front of the statehouse, instead of going on up to the station, a few squares away, for fear, he says, that he would be arrested there, although no prosecution of any kind had then been begun, and, so far as appears from the record, it was not then definitely known where the shot had come from, as far as he had been informed. A few weeks later he attempted to leave, disguised in a soldier's uniform, with a supposed pardon in his pocket, and a considerable sum of money. Besides this, he is positively connected with the conspiracy by two confessed participants in it, W. H. Culton and F. Wharton Golden—the former a clerk in the auditor's office, and the latter a close friend of appellant, and both men who until then stood well. Culton disbursed large sums of money for appellant, and Golden was intrusted by him with important undertakings. On the 25th of January, or five days before the assassination, appellant organized and brought to the capitol a body of

about 1,000 or 1,400 armed men. Many of these men were of desperate character. Others were members of the State guard, but came with their uniforms concealed. Appellant insists that this crowd was brought to Frankfort on the peaceful mission of petitioning the Legislature. On the other hand, the proof for the Commonwealth tends to show that they were brought here for the purpose of intimidating the Legislature, and that it was contemplated that, if intimidation failed, members of the Legislature would be killed. It is hard to understand why, if the purpose of this assemblage was peaceful, they should have been brought to the seat of government armed. Not only so, but about this time appellant wrote a letter referring to the London and Williamsburg companies, which he wanted to go with him, and in this he said: "We must have these men and guns. We are undertaking a serious matter, and win we must. Send some one to London and Williamsburg with such orders as will have these two companies join us Wednesday night." On the evening of January 25th the greater part of the mountain army was sent home, but 200 picked armed men were retained. These men were about the legislative halls and the public buildings from that time until the assassination. Appellant was the admitted leader in all this. He gave Culton the money, and he directed as to the character of men to be brought. His declared object was to intimidate the Legislature, and, in the absence of any proof showing that the killing of members of the Legislature was contemplated, we must know that such a result should be anticipated as the natural outcome of bringing and maintaining a body of desperate, armed men at the seat of government to intimidate them, and that their hostility would be especially directed to the deceased, who was a member of the Senate, and the contestant for the

office of governor. There is proof that different plans were contemplated, and different members of the Legislature planned to be killed. In letters written by the defendant, and by word of mouth, he said he was an advocate of open war, and after the assassination of the deceased he declared that the disorganization of the Democratic party was due more to him than to any other man. He also said that, with Goebel dead, there was no other person who could hold the Democratic party together. According to all the testimony, appellant was the leading spirit and the director of the armed men brought to the seat of government and kept there for the purpose of intimidating the Legislature from the time they were so brought until the assassination

Some other details are shown by the evidence, but these need not be noticed. The material evidence which was admitted, and is held incompetent by this court, will now be considered:

(1) The testimony as to the statements of Leander Guffy. This evidence simply tended to show that there was a conspiracy to kill the deceased. It in no way connected the appellant with the conspiracy. The fact that there was such a conspiracy was abundantly proved by other evidence, and, as this testimony did not connect appellant with the conspiracy, it could not have been prejudicial to him. Besides, the court instructed the jury, in effect, that the acts and declarations of other persons, not in the presence of the defendant, were competent against him only so far as these persons were members of the conspiracy, and their acts or declarations were in furtherance thereof. The jury, therefore, could not have considered this testimony, unless they believed from the evidence that the declarant was in the conspiracy. I do

not think there was any error of the circuit judge in submitting the question to the jury, under the testimony; but, if there was, it could not possibly have prejudiced the appellant.

(2) The testimony of Barlow and Rousseau was competent to impeach the witness Taylor, who had been introduced on behalf of appellant, and testified that he had met appellant in Louisville, by appointment, on the day of the assassination, to consult about bringing a body of men from western Kentucky, and that as soon as they heard of the shooting of Goebel they abandoned their plan. For his statement to these witnesses that "they had got men that would kill the deceased; it is fixed,"—tended to show that he knew that the assassination was to take place before he left home, and that the meeting with appellant was not for the purpose which he assigned. It is shown by the evidence that, just after the assassination, telegrams were sent out, and a large body of militia brought to Frankfort, under the orders of W. S. Taylor, then acting governor of the State, who is indicted as an accomplice of appellant in the assassination, and that these men were brought here to repel any attack that might be made to avenge the death of the deceased. The purpose of appellant's trip to Louisville, and his meeting Taylor there, was a material matter in the case; and the jury were warranted from this evidence in inferring that the witness had not assigned the true reason, but that the body of men proposed to be brought from western Kentucky was aimed for the purpose for which the militia was brought.

(3) What has been said as to the admission of the statements of Leander Guffy applies equally to the statements of J. L. Bosley, as proven by the witness Stivers. This testimony only went to show a conspiracy, and did not

connect the defendant in any way with it. The defendant was not prejudiced by its admission, if the court was in error in submitting this question to the jury, under the proof, which is not perceived.

The other matters referred to in the opinion are too small to be noticed. There are something like 2,500 pages of this record, and when viewed by the side of the evidence heard before the jury, which was clearly competent, the matters objected to, singly, or all taken together, dwindle into insignificance. This court is not warranted in reversing a judgment of conviction unless upon the whole case the substantial rights of the appellant have been prejudiced. In this case, outside of the refusal of the circuit judge to vacate the bench, all the errors complained of may justly be compared to flyspecks on the surface of the shell of a hen's egg. They could not possibly have affected the result, for the only real question in the case was whether the deceased was connected with the conspiracy. The case, therefore, is simply reduced to this: Was the circuit judge right in following the rule laid down unanimously by this court, not only in the last case before it, but in the two preceding cases, which it followed? And if judgments are to be reversed for this, how is justice to be administered?

On the whole case, from an actual reading of the record, I am satisfied that the circuit judge presided at the trial with rare ability and with entire impartiality. I am also satisfied that appellant has had a fair trial, according to the law of the land, and that the evidence warrants the verdict. I therefore dissent from the opinion of the court.

Response by Chief Justice Burnam overruling petition of Commonwealth for rehearing:

(January 20, 1903.)

On the first day of the present January term of this court, The Commonwealth of Kentucky tendered and asked permission to file a petition for rehearing in the case of the Commonwealth of Kentucky against Caleb Powers, charged with murder, which was tried and decided at the last September term of this court. The defendant, by counsel, objects to the filing of this petition, on the ground that there is no authority for such proceeding.

Appeals to this court in felony cases are regulated by section 336 of the Criminal Code, which provides as follows:

"Section 336. An appeal may be taken by the defendant in the following manner only: (1) The appeal must be prayed during the term at which the judgment is rendered, and the prayer noted on the record in the circuit court. The appeal shall be granted as a matter of right. (2) When an appeal is prayed, the court shall, if the defendant desire it, make an order that the execution of the judgment be suspended until the expiration of the period within which the defendant is required to lodge a transcript of the record in the clerk's office of the court of appeals. After the expiration of such period the judgment shall be executed unless the defendant shall have filed in the clerk's office of the court rendering the judgment, the certificate, as provided in sub-section three of this section, that the appeal has been taken, or a copy of the order of the court of appeals granting further time to lodge the transcript. (3) The appeal is taken by lodging in the clerk's office of the court of appeals within sixty days after the judgment, a certified transcript of the record. The clerk of the

court of appeals shall thereupon issue a certificate that an appeal has been taken, which shall suspend the execution of the judgment until the decision upon the appeal."

"Section 357. Appeals in criminal cases shall take precedence over all other business of the court and be placed first upon the docket for trial.

"Section 358. They shall stand for trial at the first term succeeding the lodging of the transcript in the clerk's office of the court of appeals, provided, it be so lodged ten days before the commencement of the term.

"Section 359. When an appeal by the defendant in a case of felony is lodged within ten days before the commencement of the term, or during the term, it shall stand for trial on the tenth day after it is so lodged.

"Section 360. The appeal shall be decided at the same term at which it is tried."

It will be observed that all these provisions of the Criminal Code look to a speedy trial and decision of felony cases by this court. No provision is made for a rehearing by the defendant, and, except in cases expressly provided for by statute, a rehearing is not a matter of right. But we are of the opinion that this court has, by virtue of its appellate jurisdiction in such cases, power to suspend the issual of the mandate and rehear the case during the term at which it is tried. But, if the power is not exercised during the term, the decision in the case becomes final, and the court has no jurisdiction at a subsequent term to retry the appeal. In *Nelson v. Com.*, 94 Ky., 594, 15 R., 265, 23 S. W., 348, it was decided that section 760 of the Civil Code applied to civil cases only, and, as there was no provision in the Criminal Code for time in which to file a petition for rehearing, that in case of an affirmance of the judgment of conviction

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the mandate might issue immediately. The question in that case partly involved the decision of the one before us, and we are of the opinion that this court has no jurisdiction to grant a rehearing in this case at this term of the court.

Motion overruled.

CASE 33—ACTION BY MELVINA BOARD TO RECOVER DOWER IN CERTAIN
LANDS OWNED BY HER DECEASED HUSBAND.—DEC. 3.

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138	332

APPEAL FROM M'LEAN CIRCUIT COURT.

JUDGMENT FOR DEFENDANTS AND PLAINTIFF APPEALS. AFFIRMED.

DOWER—PURCHASE MONEY LIEN—SURPLUS PROCEEDS—VESTED RIGHTS
OF WIDOW—PURCHASER.

1. Under Rev. St., ch. 47, art. 3, sec. 6, adopted in 1852, now Kentucky Statutes, sec. 2135, providing that a wife should not be endowed of land sold but not conveyed by the husband before marriage, nor of land sold bona fide after marriage to satisfy a lien or incumbrance created before marriage, or created by deed in which she joined, or to satisfy a lien for purchase money, where the whole of the land was sold under a judgment for the balance of the purchase money due thereon, the wife is not entitled to dower therein, although she was married to her husband prior to the adoption of the Act of 1852.

2. The wife's inchoate right of dower is not a vested right in the sense that it is not subject to change or even abolishment by the Legislature so long as it remains in expectancy—that is, during the life of the husband.

3. The Act of 1852, providing that if there should be a surplus of the land or proceeds of sale, after satisfying the liens, she shall have dower or compensation out of such surplus, unless such surplus or proceeds were received or disposed of during the lifetime of her husband; the whole of the land having been

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sold, the widow's right to dower must be satisfied out of the surplus proceeds of the sale, for which the land nor the purchaser thereof is not liable.

W. E. GARTH, JONSON & WICKLIFFE AND SIMS & COVINGTON, FOR APPELLANT.

POINTS ARGUED AND AUTHORITIES CITED BY APPELLANT.

1. A statute will never be construed to have a retrospective operation where that construction may be avoided.

2. The wife's interest in her husband's land is an interest that can not be divested without her consent, either by the acts of the husband, or the act of the Legislature. *Rose v. Rose*, 46 S. W., 424; *Williams v. Courtney*, 77 Mo., 587; *Maguire v. Maguire*, 7 Dan., 154; *Anderson's Trustee v. Stewart*, 79 Ky., 499; *Williams v. Williams*, 11 Ky. Law Rep., 499; *Bright's Husband and Wife*, vol. 1, page 387; *Washburn on Real Property*, vol. 1, page 312; 1 Dallas, 415.

3. The interest of the wife is such an interest, even during the life of the husband, as to be an encumbrance upon land, and to authorize her to maintain an action even against her husband for fraud in conveying the land before he was married to her. IV. B. M., 215; *Maguire v. Maguire*, &c.

4. Section 2135 of the Kentucky Statutes was not intended by the Legislature to divest the interest of a wife, already married, in lands owned before the passage of the statutes; but if it was so intended, then it is clearly against the spirit of the decisions in this court, in all the cases cited above, and especially in *Rose v. Rose*, and in other cases since decided to the same import.

5. The decisions in Kentucky rendered in cases arising under section 2135 are not conclusive of this case, because in none of those cases were the facts parallel with the facts in this case. All those cases arose in litigation over the interest in lands the title to which had been acquired after the passage of the statute.

W. B. NOE, W. A. TAYLOR AND LITTLE & LITTLE, COUNSEL FOR APPELLEE.

POINTS CONTENTED FOR AND AUTHORITIES CITED.

1. During coverture, the husband owned land, which was sold under judgment in 1856 to pay purchase money and other debts. The husband died in 1897. The wife (appellant) sued the purchasers of the land for dower and rents. Contended that appellant's only remedy was against those who received the surplus proceeds of the sale after paying purchase money, and

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not against the purchasers. Kentucky Statutes, 2133; Malone v. Armstrong, 79 Ky., 248; Tisdale v. Risk, 7 Bush, 139; Ratcliffe v. Mason, 92 Ky., 190.

2. Where in suit at law on purchase money note, an equitable defense is filed, and plaintiff files affidavit that the delay caused by the defense would endanger the debt, and thereupon the court requires security (under section 11, Myer's Code) and accepts it, the vendor does not thereby waive his lien. McClure v. Harris, 12 B. M., 265; 2 Story's Eq. Jur., 1224; Bradley v. Curtis, 79 Ky., 328.

3. Revised Statutes were not retrospective, chapter 21, sec. 14.

4. A retrospective statute is one that takes away or impairs vested rights. Black's Inter. Laws, 247.

5. If wife owned lands prior to Married Woman's Act in 1894, the husband had a vested interest, which was not affected by that act, but if the wife acquired title after 1894, the right of the husband was governed by that act, though married before. Mitchell v. Violet, 20 Ky. Law Rep., 378; Cooley's Const. Lim., 442; Rose v. Rose, 20 Ky. Law Rep., 417.

6. Dower does not become freehold estate until assigned. Anderson v. Sterrett, 79 Ky., 499.

7. The wife's inchoate right of dower is not a vested interest, and can not so become until the husband's death, and during the husband's life the Legislature has full power to abridge, regulate, or altogether abolish it. Black's Law Dictionary, titles, "inchoate" and "vested estate;" 6 A. & E. Ency. (2d ed.), 956 and notes, *ib.*, 957, citing authorities; Mitchell v. Violet, *supra.*; 4 Kent's Com., 61; McNeer v. McNeer, 19 L. R. A., 256 and note by Mr. Rich.; Stewart, Husband and Wife, sec. 262; 2 Bishop Law of Married Women, sec. 42; Cooley's Const. Lim., 441; Hatcher v. Buford (Ark.) 27 L. R. A., 510; Sanders v. McMillan, 39 A. St. R., 27, and note by Mr. Freeman; 1 Washburn, Real Property, 280; Moore v. The Mayor, 4 Sandf., 456; Randall v. Kreiger, 23 Wall., 137; 2 Dembitz on Land Titles, p. 324.

OPINION OF THE COURT BY JUDGE O'REAR—AFFIRMING.

Appellant and her late husband, Geo. L. Helm, were married in 1848. The husband died intestate in 1897. In October, 1880, he was seised in fee simple of a tract of land then in Muhlenberg county, now McLean county, containing about 757 acres. A portion of this land (nine lots) her husband sold and conveyed (she joining in the conveyances)

between 1850 and 1854. The remainder of the original tract her husband mortgaged to various persons and firms in 1854 and 1855. Appellant did not join in the execution of any of the mortgages. She brought this suit in 1898 to have dower allotted to her in the land above mentioned, in the conveyances of which she did not join. The principal defense is that the land had been sold under a decree of the McLean circuit court in 1856, in consolidated actions brought against said Geo. L. Helm to enforce the liens on this land, evidenced by the mortgages above named, as well as to foreclose purchase-money liens recited and retained in the deed by which Helm obtained the title. The balance of the purchase money then owing was \$3,714.10. The land and lots brought at the sale \$6,868; the excess above the balance owing on purchase money having been applied to the payment of costs in the actions, and then to certain mortgage debts therein sued on. The vendor having died, the actions in his name were revived in the name of the administrator, who also brought another action on the remaining unpaid purchase-money notes. It was in these suits, consolidated with those to foreclose or enforce the above and other mortgage liens, that the decree of sale was entered, under which the land was sold in 1856. A demurrer to the defense above outlined having been overruled, and no pleading sufficiently controverting it having been filed or tendered, appellant's petition was dismissed.

It seems to be the contention of the appellant that her right to dower in this land became fixed or vested as of October, 1850; that then it was the law that the wife should be endowed of her husband's lands, without regard to liens or obligations for purchase money or other cause, except she voluntarily relinquished such right; that the Revised Statutes, adopted in 1852, by section 6, art. 3, c. 47, and

since continued in force, changed the rights of wives in this respect, but as to her rights that statute was not intended by the Legislature to apply, as to have it to do so would be violative of her vested right, and would therefore be unconstitutional. We are unable to agree with the argument. The wife's inchoate right of dower is not a vested right in the sense that it is not subject to change, or even abolishment, by the Legislature, so long as it merely remains an expectancy—that is, during the life of the husband (Cooley, Const. Lim., 441; 2 Bish. Mar. Wom., section 42; McNeer v. McNeer [Ill.], 32 N. E., 681, 19 L. R. A., 256; Mitchell v. Violet, 104 Ky., 77 (20 R., 378) 47 S. W., 195; Phillips v. Farley (23 R., 2201) 66 S. W., 1006), although it is a valuable right, which the law will recognize and protect (Petty v. Petty, 4 B. Mon., 215, 39 Am. Dec., 501). The case of Rose v. Rose, 104 Ky., 48 (20 R., 417) 46 S. W., 524, 41 L. R. A., 353, 84 Am. St. Rep., 430, is relied on by appellant as sustaining the contrary view to that here announced. The doctrine of the Rose case is evidently misunderstood by counsel. In that case, and in the one of Mitchell v. Violet (decided the following day), the questions were as to the character of the husband's estate in his wife's lands. It was held that inasmuch as his right to the use of her lands during coverture was fixed and complete as to all lands owned by her during her coverture, and prior to the law of 1894, the Legislature could not curtail this right of the husband without his consent. His right was not, in that case, in expectancy, merely, but was fixed. The facts of this case would be analogous to Rose v. Rose only in event the husband had died before the Legislature undertook to change the wife's dower interest. Chapter 47, art. 4, section 6, Revised Statutes, which is identical with section 2135, Kentucky Statutes, was as

follows: "The wife shall not be endowed of land sold but not conveyed by her husband before marriage; nor of land sold *bona fide* after marriage to satisfy a lien or encumbrance created before marriage, or created by deed in which she joined, or to satisfy a lien for the purchase money. But if there is a surplus of the land or proceeds of sale after satisfying the lien, she shall have dower or compensation out of such surplus, unless the surplus proceeds of sale were received or disposed of by the husband in his lifetime." The whole of the land was sold in this case. Therefore there was no surplus of the land. Then the widow's right to dower must be satisfied out of the surplus proceeds of the sale, for which the land is not liable, nor are its present owners. *Tisdale v. Risk*, 7 Bush, 139; *Melone v. Armstrong*, 79 Ky., 248; *Ratcliffe v. Mason*, 92 Ky., 190 (13 R., 551) 17 S. W., 438. The widow's right to dower was subordinate to the vendor's purchase-money lien before the adoption of the Revised Statutes, *supra*. *McClure v. Harris*, 12 B. Mon., 264. But in any event, we hold that the sections of the statutes above quoted control her right in this case.

It follows that the judgment of the circuit court should be affirmed.

Petition for rehearing by appellant overruled.

New York Life Insurance Company v. Weaver's Admr., &c.

CASE 35—ACTION BY NEW YORK LIFE INS. CO. v. MARY L. WEAVER'S ADMR. &C., TO RECOVER VALUE OF POLICY PAID WHICH WAS ALLEGED TO HAVE BEEN OBTAINED BY FRAUD OF INSURED.—DEC. 4.

New York Life Insurance Co. v. Weaver's Admr., &c.

114	295
138	144

APPEAL FROM MASON CIRCUIT COURT.

JUDGMENT FOR DEFENDANTS AND PLAINTIFF APPEALS. AFFIRMED.

LIFE INSURANCE—INCONTESTABLE POLICY—FRAUD—RESCISSION—LACHES—DECEIT.

Held: 1. Where an insurance policy was procured by fraud, the fact that by its terms it was incontestable did not preclude the insurance company from rescinding it within a reasonable time after discovering the fraud on surrendering the premiums received.

2. Where an incontestable insurance policy was procured by fraud, and the company did not elect to rescind the same during the life of insured, and on her death, under an impression that it could not defend an action on the policy, paid the same, it was not entitled to maintain an action against assured's administrator for deceit to recover the amount of the policy paid and other damages.

A. E. COLF & SON, FOR APPELLANT.

E. L. WORTHINGTON AND THOMAS R. PHISTER, FOR APPELLEE.

(No briefs.)

OPINION OF THE COURT BY JUDGE BURNAM—AFFIRMING.

This case comes up on appeal from a judgment of the Mason circuit court. A general demurrer was sustained to the plaintiff's petition. It alleges, in substance, that appellant issued a policy of insurance on the life of Mary L. Weaver for \$10,000, payable, at her death, one half to her estate and the other half to her children; that the policy was issued upon the faith of representations made by Mary L. Weaver in her application therefor, and upon the re-

port of the medical examiner as to her physical condition at the time; that the insured, Mary L. Weaver, made many false and fraudulent statements as to the condition of her health in this application, and that W. H. Hoard, their examining surgeon, entered into a fraudulent and corrupt conspiracy with the insured to procure the issual of said policy, and made divers false and fraudulent statements in his medical report as to the physical condition of the insured; that after the death of the insured, appellee L. C. Harrison, as administrator of Mary L. Weaver, and the statutory guardian of her children, brought suit upon the policy, which was by its terms incontestable; that, after being summoned to answer, they paid the amount of the policy, with interest and costs, and a judgment was entered dismissing the suit. And charge that by reason of the fraudulent conspiracy entered into by Mary L. Weaver and W. H. Hoard, and the false representations made by them, they had been cheated out of \$10,000 paid, and subjected to other expenses, and pray a judgment for \$15,000 in damages for the deceit practiced upon them by Mary L. Weaver and Dr. Hoard. They do not allege that they did not know of the fraud before the payment of the money. The law is well settled that, when a party has been induced by fraud to enter into a contract, he may have same rescinded, provided he has not acted upon it, or recognized it as binding, after the discovery of the fraud. But he must exercise the right of rescission within a reasonable time after the discovery. But if he delays instituting his suit for an unreasonable time, he will be held to have confirmed the contract. If, as alleged, the policy was obtained by fraud, we think there can be no doubt that, notwithstanding the incontestable clause therein, a court of chancery would have canceled it in a suit for a rescission

brought within a reasonable time after its issual, and during the lifetime of the insured, upon the tender back of the premiums received by the company. But in this case appellant not only failed to take any steps looking to a repudiation of the contract during the lifetime of the insured, but, when sued upon the contract after her death, confessed liability by the payment of the principal, interest and cost. It is an axiom of the law that a litigant is entitled to his day in court, but that he is not entitled to two days; and a judgment in an action necessarily determines not only every question which is presented, but every one which ought to have been presented, or such as are essentially connected with the subject-matter of the litigation, especially as to matters of claim and defense. See *Freem. Judgm.* (2d Ed.), section 249. Having failed to institute a suit for a rescission within a reasonable time, or to make defense when sued upon the policy, appellant cannot be permitted to relitigate questions which were necessarily concluded by the judgment. Besides, if, as appellant seems to concede, the incontestable clause in the policy precluded them from resisting its payment on the ground of fraud, it logically follows that it is equally efficacious to defeat any action brought against the estate of the decedent for damages by reason thereof.

For reasons indicated, the judgment is affirmed.

Craddock, &c. v. Payton, &c.

CASE 36—ACTION BY S. M. PAYTON, &c. AGAINST J. M. CRADDOCK, &c.,
SURETIES ON ADMINISTRATOR'S BOND FOR A DEVASTAVIT.—DEC. 4.

Craddock, &c. v. Payton, &c.

APPEAL FROM HART CIRCUIT COURT.

JUDGMENT FOR PLAINTIFFS AND DEFENDANTS APPEAL. AFFIRMED.

LIMITATION—ADMINISTRATOR'S BOND—ACTION BY DISTRIBUTE.

Held: Under Kentucky Statutes, section 2500, providing that "a surety shall be discharged from liability to a distributee after five years from the time a cause of action shall have accrued," and under Civil Code, section 429, and Kentucky Statutes, section 3858 providing that a distributee "may sue for a settlement of the estate immediately after the qualification of the personal representative," a cause of action can not be maintained by the distributee against the surety on an administrator's bond for a devastavit, until there has been a judgment ascertaining the amount of the demand against the estate, and limitation begins to run against the surety from the time such judgment is rendered.

S. M. PAYTON, ATTORNEY FOR APPELLEE.

POINTS AND AUTHORITIES.

1. The statute of limitations begins to run against the sureties in the bond of a fiduciary in favor of a distributee devisee or creditor, from the accrual of the cause of action and not before; and a cause of action does not "accrue" in favor of any such claimant against the sureties on the bond of fiduciaries until a liability has been ascertained and adjudged against the fiduciary himself by a court of competent jurisdiction. Section 2550, Kentucky Statutes; *Clark v. Commonwealth* for the use, &c., 5 Mon., p. 99; *Hobbs v. Middleton*, 1 J. J. Marshall, 176; *McCalla's Admr. v. Patterson*, 18 B. M., p. 201; *Lee v. Waller*, 3 Met., p. 61; *Young v. Duhme*, 4 Met., 244 and *Emmerson' Admr. v. Herriford*, 8 Bush, p. 237.

2. If the enforcement of a judgment be obstructed by an appeal, supersedeas or injunction, the time of such obstruction shall be disallowed in the computation of the limitations, sections 2550 and 2552 of the Kentucky Statutes.

Craddock, &c. v. Payton, &c.

MCCANDLESS & JAMES, FOR APPELLANT.

The original brief for appellant is not in the record, but the following extract is from appellant's petition for a rehearing.

The learned author of the opinion in this case, says:

"In an unbroken line of decisions, this court had held that a suit upon a bond of a personal representative for a devastavit can not be maintained until there has been a judgment ascertaining the amount of the demand against the estate, and showing assets in the hands of the personal representative sufficient to pay the demand or a part of it."

(Citing numerous early decisions.)

All of which is true; however, with equal truth and propriety we might add that "since the year 1881, it has been universally held by this court that an action may be maintained against a personal representative and the sureties upon his official bond by the creditors and distributees of the estate nine months after his qualification," and cite as directly in point. *Murrell v. McAllister*, 79 Ky., 311; *Robinson v. Elam*, 90 Ky., 300.

Take the case cited in our brief: A personal representative qualifies, reduces the assets of the estate to possession and departs to a foreign country leaving no property in this State. What is the remedy of the distributees and creditors? The sureties on the bond may be simply solvent, but as there has been no "judgment of the court ascertaining the amount of the demands against the estate and showing assets in the hands of the personal representative," no suit can be maintained against them and the claims are lost.

We insist that to revert to the ancient doctrine in this case, leaves us in utter confusion on the subject, with no standard of construction for similar statutes save the *ipse dixit* of the court. Why should we abandon the more recent salutary rule of construction and return to a rule so long discarded by this court? The opinion gives no reason therefor, the learned author contenting himself with the citation above, "this court had decided."

OPINION OF THE COURT BY JUDGE BURNAM—AFFIRMING.

On the 23d day of December, 1893, there came to the hands of B. C. Gardner, administrator *de bonis non* of the estate of James Earl, deceased, \$2,004.11. In January, 1896, D. W. Browning, as guardian of two of the infant children of deceased, instituted a suit against Gardner,

as administrator, the widow, and the two remaining infant children, of the deceased, under section 428 of the Civil Code, for a settlement of decedent's estate; and the case was referred to the master commissioner for this purpose, who reported that, after paying the debts of decedent, there remained a balance of \$1,057.39 in the hands of the administrator for distribution to the widow and heirs at law. Exceptions were filed to this settlement on the ground that the entire fund, which arose from a judgment against the Louisville & Nashville Railroad Company for the accidental killing of the deceased, could not be subjected to the debts of the intestate, but belonged exclusively to the widow and children of deceased, under the statute. All these exceptions were overruled, and the report confirmed, at the April term, 1897, of the Hart circuit court. All of the distributees excepted to this judgment, and subsequently prosecuted an appeal therefrom to this court, which was decided on the 20th of January, 1900, 21 R., 1295 (54 S. W., 833); and the judgment of the lower court being confirmed, except as to certain claims paid by the administrator where the verification was insufficient, and the cause remanded, with instruction to allow needed proof to be made. After the return of the case, S. M. Payton purchased the interest of the widow in the funds in the hands of Gardner as administrator, and in December, 1900, instituted this suit (the widow uniting therein) against the appellants, J. M. Craddock and J. T. Price, sureties upon the bond of Gardner as administrator *de bonis non*, for the amount due him as assignee of Mrs. Jaggars. The appellant Craddock pleaded and relied upon section 2550 of the Kentucky Statutes in bar of appellee's claim, which reads as follows: "A surety for an executor, administrator, or curator, or for a sheriff to whom

Craddock, &c. v. Payton, &c.

a decedent's estate has been transferred, shall be discharged from all liability as such, to a distributee, devisee or ward, when five years shall have elapsed without suit, after the accruing of the cause of action, and after the attaining of full age by the devisee, distributee or ward; but the failure to commence action in time by one shall not affect the right of the other." Judgment was rendered in favor of plaintiff for the full amount of his claim, and, a motion for a new trial having been overruled, this appeal is prosecuted.

It is the contention of appellants that appellee's cause of action against the administrator of James Earl accrued immediately upon his qualification as administrator, or, at most, within nine months from the granting of such administration, and that, as no suit was instituted upon the bond for a devastavit until more than five years and nine months had elapsed after the accrual of their cause of action, their plea of limitation was conclusive of appellee's right to recover, and, to support this contention, rely upon the case of *Com. v. Hammond*, 49 Ky., 62, and *Murrell's Adm'r v. McAllister*, 79 Ky., 311. In the 49 Ky. case the question arose under the act of 1838 (3 St. Law, 558), limiting the time of bringing action against sureties, the second section of which provided "that from and after the first day of July, 1838, sureties, their executors, administrators, heirs and devisees, shall be discharged from all liabilities, to distributees, devisees and wards, on administration and guardian bonds, when five years shall have elapsed without suit after the youngest of the distributees, devisees or wards had attained full age." In construing this statute, it was held that, where the distributees were all of full age when administration was granted, suit must be brought within five years after the execution of the bond. But the Gen-

eral Assembly, in the adoption of the Revised Statutes of 1852, made a very material alteration in the language of this section, by the insertion of the words "after the accruing of the cause of action." Revised Statutes 1852, c. 97, section 13; thus making it conform to other sections of the statute as to limitations of actions. Under the provisions of sections 428 and 429 of the Civil Code, and section 3858 of the Kentucky Statutes, a representative, legatee, distributee or creditor of a deceased person may bring an action in equity for the settlement of his estate immediately after the qualification of such representative. See *Holland v. Lowe*, 101 Ky., 98 (19 R., 97) (39 S. W., 834). But in an unbroken line of decisions this court had held that a suit upon the bond of a personal representative for a devastavit can not be maintained until there has been a judgment ascertaining the amount of the demand against the estate, and showing assets in the hands of the personal representative sufficient to pay the demand, or a part of it. See *Clark v. Com.*, 21 Ky., 99; *Hobbs v. Middleton*, 24 Ky., 185; *Jeeter v. Durham*, 29 Ky., 228; *McCalla's Adm'r v. Patterson*, 57 Ky., 201; *Lee v. Waller*, 60 Ky., 61; *Young v. Duhme*, 61 Ky., 244; *Emmerson's Adm'r v. Herriford*, 71 Ky., 237. There was a controversy between the creditors of the deceased and his distributees as to who was entitled to the funds in the hands of the personal representative, and until this matter was determined by the judgment of the circuit court, confirming the master's report, in April, 1897, it was impossible to know the extent of appellee's demand against the personal representative. That judgment, for the first time, ascertained the amount of the claim; and, as it was not superseded, appellee had a right to demand of the personal representative that he should pay to him the amount shown due by this report,

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and upon his failure to do so there accrued to him a cause of action against the securities upon his official bond for the first time, and, as five years had not elapsed from this date before the institution of this suit, the plea of limitation could not be successfully interposed.

In so far as the case of Murrell's Adm'r v. McAllister, 79 Ky., 311, is in conflict with our conclusion as to the time when appellee's cause of action against the sureties of the personal representative for a devastavit accrued, it is overruled, and the judgment appealed from affirmed.

Petition for rehearing by appellant overruled.

CASE 37—ACTION BY W. B. SMITH AGAINST M. J. RICHMOND AND OTHERS TO RECOVER MONEY FROM HIS ASSOCIATE CONTRIBUTED TO PROCURE IMMUNITY FROM PROSECUTION FOR BRIBERY—DEC. 9.

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114	303
f132	709

APPEAL FROM KENTON CIRCUIT COURT.

JUDGMENT FOR DEFENDANTS AND PLAINTIFF APPEALS. AFFIRMED.

ILLEGAL CONTACT—BRIBERY OF OFFICIALS—CORRUPTION FUND—PARTNERS IN CRIME—RECOVERY OF FUNDS BY CONTRIBUTOR.

Held: Plaintiff, defendant, and another, who were engaged in maintaining an illegal lottery in Ohio, met; and on defendant's representation that it was necessary to contribute money with which to bribe the State and city officials, in order to procure immunity from prosecution, plaintiff paid to defendant monthly for several years various sums to be used for such purpose. Defendant converted the money to his own use. **HELD**, that defendant was not plaintiff's agent, but that plaintiff and defendant were partners in an illegal enterprise, and plaintiff could not recover the amount so paid.

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H. P. WHITTAKER AND M. M. DURRETT, FOR APPELLANT.

HARVEY MYERS, FOR APPELLEES.

(No briefs.)

OPINION OF THE COURT BY JUDGE GUFFY—AFFIRMING.

This is an appeal from a judgment of the Kenton circuit court in the suit of the appellant against the appellees. The court having sustained a demurrer to the petition as amended, and appellant failing to plead further, his action was dismissed.

The sole question presented for decision is whether the petition as amended stated a cause of action, or, in other words, whether, upon appellant's own showing, he was entitled to relief from a court of equity. So much of the petition as is material to plaintiff's cause of action reads as follows: "(2) Now comes W. B. Smith, the plaintiff, and, for his amended petition herein, states that on or before the — day of May, 1890, the defendant, M. J. Richmond, represented to this plaintiff that he, the said Richmond, was the employe and agent of S. T. Dickinson & Co. and their associates, who then were operating and carrying on a lottery business in the city of Cincinnati, Ohio, under the charters of what were known and designated as the 'Kentucky State Lotteries;' that one Louis Davis, since deceased, was at said time and thereafter operating and carrying on a lottery business in said city by permission of the said S. T. Dickinson & Co. and their associates, and of this plaintiff; that this plaintiff was at said time and thereafter operating and carrying on a lottery business in said city as the sole owner of the Colorado State Lottery, for which he had obtained a charter from the State of Colorado; that at said time the said defendant M. J. Richmond approached this plaintiff and represented to him

that it would be necessary for plaintiff and the said lottery companies represented by said defendant to pay one George B. Cox, a citizen and resident of said city, certain sums of money, in order to procure immunity from arrest and prosecution by the State and municipal authorities of the State of Ohio and said city for operating and carrying on said lottery business aforesaid; that shortly after the said representations so made as aforesaid by Richmond to this plaintiff, to-wit, on or about the — day of May, 1890, a meeting was held in the city of Cincinnati, at which plaintiff, said Richmond, acting in his capacity of employe and agent as aforesaid, and Louis Davis were present, and it was then and there agreed that plaintiff should pay \$150 per month, the companies represented by said Richmond should pay \$150 per month, and said Davis should pay \$50 per month, to said Cox, for the purpose aforesaid; and it was further agreed by and between the parties at said meeting that the several sums above mentioned should be delivered to said Richmond, to be paid by him to said Cox for the said purposes, and this the said Richmond agreed to do. Plaintiff further states that pursuant to said agreement he did deliver to said Richmond in each and every month from May, 1890, to April, 1892, both inclusive, the sum of \$150, and that pursuant to said agreement, and on the representation to this plaintiff by said Richmond that it was necessary for plaintiff to pay to said Cox for the purpose aforesaid a further sum of \$75 per month, plaintiff did deliver to said Richmond in each and every month from May, 1892, to April, 1895, both inclusive, the sum of \$225; and that pursuant to said agreement this plaintiff did deliver to said Richmond in each and every month from May, 1895, to May, 1897, both inclusive, the sum of

\$175; making a total sum of money so delivered to said Richmond, to be paid to said Cox for the purpose aforesaid, of \$16,075. Plaintiff further states that said defendant M. J. Richmond failed to pay said sum of money, or any part thereof to said Cox, and fraudulently converted the same, and all of it, to his own use, and refuses to return said money, or any part thereof, to this plaintiff, although plaintiff has demanded same. Plaintiff reiterates herein each and every allegation of his original and first amended petition, and makes same part thereof."

We copy the opinion of the court below, as one of the means of making a clear statement of the contentions of the parties hereto: "The cause is submitted on demurrer to petition as amended. There are some depositions taken on behalf of plaintiff in the record, but they are not read or considered on this motion. There is no ascertainment of the facts, and the allegations of the petition as amended are taken as true only for the purpose of this demurrer. The facts so taken as true are as follows: In the year 1890, or prior thereto, the plaintiff, Smith, was engaged in the business of conducting a lottery in the city of Cincinnati, Ohio. S. T. Dickinson & Co. were at the same time engaged in the same business in the same city. M. J. Richmond, defendant hereto, was the employe and agent of said Dickinson & Co. One Louis Davis was also conducting the same business at same time and place. The plaintiff, Smith, and said Davis and said Richmond, representing said Dickinson & Co., held a meeting, at which it was agreed that the several parties engaged in said business should each month pay to said Richmond a certain sum of money, to be applied by said Richmond in bribing and corrupting the authorities of the State of Ohio and of the city of Cincinnati, to thereby procure immunity for those engaged in said business. The

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said Smith, pursuant to said agreement, paid to said Richmond from May, 1890, to May, 1897, the sum of \$16,075, but the said Richmond, instead of using said money in the bribery of Ohio officials (assuming, for the purposes of this demurrer, that such a thing were possible), retained the money and converted it to his own use. This action is instituted by Smith to recover of Richmond said sum of \$16,075, and, on demurrer to the petition as amended. the question arises as to whether the law and the courts will furnish relief to one occupying the position held by the plaintiff, Smith. This action is in equity. It is contended by the defendant on this demurrer that where the consideration of a contract is an agreement to hinder, impede or defeat the administration of the criminal or penal laws, the contract is against public policy, is void, and that no party thereto can enforce it by process of law. The plaintiff, on this demurrer, admits the existence of this principle contended for by defendant, but says it applies only as between the parties to such a contract, and does not apply as between one of the parties and his agent, or the agent of all the parties, acting as go between in carrying out the vicious provisions of the contract. The plaintiff quotes and relies upon the opinion of the Kentucky court of appeals in case of *Martin v. Richardson*, 94 Ky., 183 (14 R., 847) 21 S. W., 1039, 19 L. R. A., 692, 42 Am. St. Rep., 353. Martin was the agent of a lottery company. He sold to Richardson some tickets in his lottery, one of which drew a prize; and, while Richardson was ignorant of this fact, Martin induced him to exchange the tickets he held for other tickets, and Martin collected the prize from the lottery company. Richardson sued Martin for the money, and the court of appeals held that he could recover; that, even assuming the purchase and sale of the lottery tickets to have been an illegal transaction.

Richardson could not avail himself of that fact as a defense. It seems to me that it would have been strange had the court of appeals held otherwise. The purchase and sale of the lottery tickets constituted a transaction that was, at most, illegal. The act of Martin in procuring an exchange of the tickets was a crime. The court of appeals simply refused to permit the commission of an act, at most illegal, by one, 'to be pleaded as a defense to the commission of a crime by another.' It refused to permit the commission of a lesser wrong by one to be used as a defense to the commission of a greater crime by another. This opinion in that case is not applicable to the case at bar. The plaintiff quotes and relies upon Wharton on Agency, and the opinions of several State courts, from which it may be assumed to be the rule that an agent who has in his hands money belonging to his principal, on a closed account, can not set up as a defense, in an action by the principal for money had and received, the illegality of whole or a part of the transaction. In all the extracts from these authorities quoted in brief for plaintiff, the word 'illegal' is used in speaking of the contract. Plaintiff's counsel has not provided this court with the facts of any of the cases he has referred to. The only reference made in any of the extracts set out in plaintiff's brief is to 'illegal' contracts. It appears certain that if Smith had furnished this money to Richmond as his agent for the purpose of conducting a lottery, and that Richmond retained and converted the money, Smith could recover of him, even in a State where the conducting of a lottery was unlawful. But in the case at bar the plaintiff was for seven years continuously engaged not only in conducting an unlawful business, but in attempting, and, as he believes, successfully attempting, to bribe and corrupt the authorities of Ohio and Cincinnati, and to that end he delivered to

Richmond over \$16,000. For the seven years this plaintiff was engaged in the commission of an act that this court may fairly assume to be a crime in the State of Ohio, the place of its commission. Counsel for plaintiff has not furnished this court a single instance in which any court has given relief to one in such a position, as against a defaulting agent. I believe there is a broad distinction between contracts illegal and contracts criminal, even when considered in reference only to the relations and respective rights of one of the parties thereto and his agent. This plaintiff is asking the law and the courts of Kentucky to aid him in recovering back money that he paid out for seven years, believing it was being used in the bribery of the authorities of a sister State. This does not seem to be the purpose for which the courts of this State are created or are existing. It is but rarely that such an unblushing confession is seen as in the plaintiff's pleadings in this case. It may be observed that Richmond, in putting this money in his pocket, and keeping it there, although in so doing he defaulted, was guilty of an offense much less than that he would have been guilty of had he carried out the purposes of his principal. In this connection the fact is emphasized that as to Richmond there is no evidence that these things are true, and that they are assumed to be true solely for the purpose of this demurrer. It appears by his own pleading that the hands of Smith are so unclean that he is not entitled to ask any relief in any court, and the demurrer to the petition as amended is sustained. The plaintiff declines to plead further. The petition herein is dismissed, and it is adjudged that the defendant recover of the plaintiff his costs herein, to which plaintiff excepts, and prays an appeal to the court of appeals which is granted."

It is evident from the pleadings of the plaintiff that he,

the appellee Richmond, and Davis were engaged in operating lotteries in the city of Cincinnati, which was a violation of the criminal laws of the State; that in order to procure immunity from arrest and punishment, or, in other words, to corrupt the officers and to defeat justice, they made the agreement set out in the petition, and Richmond was to receive and pay over the money to procure the desired immunity from arrest and prosecution; and that the business was so conducted for about seven years, during which time the sum aggregating \$16,075 was paid over to Richmond: It may be inferred from the petition that the desired protection was secured, as it is nowhere claimed that the object of the agreement was defeated. Appellant refers to a number of decisions of this and other courts in his two able briefs, which he claims sustains his contention in this case. Upon examination of the various cases, it will be found that they cover what may be called three classes of cases: One is where a party simply employs a man as agent to go and pay money to a third party for an illegal purpose. Another class is where parties may be engaged in an illegal business, and have realized considerable pecuniary profit, in the shape of money or other property, which is in possession of the other party to the crime, in which case some courts hold that such party has in his hands money or property which justly belongs to the other parties, and, although it is the fruit of illegal business, yet he will not be allowed to have the same simply because the business which procured the property is illegal. The other class is where employees who are simply the servants employed to carry on and conduct an illegal business will not be permitted to withhold from the owner property which was placed in their hands by him for the purpose of conducting or carrying on such illegal business. The case at bar does not fall within the

rule announced in any of the cases referred to. In this case these parties clearly entered into a conspiracy or partnership for the purpose of enabling them to violate the laws of the State of Ohio, and to corrupt or bribe the officers of the law. These parties were in reality partners in the venture or undertaking specified, and in the general course of business, be it legal or illegal, one of the partners only would handle the money or pay out at a time. In other words, all the parties would not be expected to go together and pay out or receive money together, but the act of one is the act of all. We conclude, therefore, that the transaction set up in the petition must be treated as the formation of a partnership for an illegal purpose, greatly to be condemned from any standpoint. A corruption of the authorities of a great State or city should not be tolerated. The payment of money to defeat the enforcement of the criminal laws is one of the most heinous of crimes, and no court should afford any relief to the parties engaged in such a nefarious business. The operation of lotteries is by common consent regarded as contrary to public policy, and highly immoral, and this plaintiff had added to that unholy business a still greater crime of bribing public officers, and paying money to prevent the enforcement of the criminal laws of a sister State. Both parties, according to the petition, are guilty of a great crime, and the court should not hear the complaints of either in respect to the illegal business conducted by them. To allow such would, in effect, be to wink at, if not to sanction, the most corrupt of practices. We think the opinion of the court below is in accord with nearly all, if not quite all, the authorities respecting such transactions, and in accord with the principles announced in the recent case of *Safe Deposit Co. v. Respass* (23 R., 1905) 66 S. W., 421, 56 L. R. A., 479. To al-

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low the appellant to recover in this case would, in effect, be saying to all parties that "you can go on with reasonable safety, furnish money to a person for illegal and criminal purposes, and, after you have derived the benefit therefrom, sue the so-called agent and recover back the money, unless he, perchance, was able to prove to the satisfaction of the court that he in like manner had paid over the money for the said unlawful purposes." As before stated, we do not think that Richmond was the agent of plaintiff, in the legal sense of agency, but was simply one of the partners in crime; and we know of no court that has ever sustained a suit of one partner for an accounting for money invested in an unlawful purpose, especially if such purpose was to violate the criminal laws of a State, and shield offenders from punishment, or corrupt public officers.

Judgment affirmed.

CASE 38—ELECTION CONTEST BY M. M. LOGAN AGAINST E. W. EDWARDS FOR COUNTY ATTORNEY.—DEC. 9.

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APPEAL FROM EDMONSON CIRCUIT COURT.

JUDGMENT FOR PLAINTIFF AND DEFENDANT APPEALS. REVERSED.

ELECTIONS—CONTEST—PRESERVATION OF BALLOTS—CERTIFICATES—
VOTERS—EVIDENCE—IDLOTS—INSANE PERSONS—QUALIFICATION—
RESIDENCE—MARKING BALLOTS.

Held: 1. The statute providing for the security and custody of ballots make such ballots primary evidence in an election contest, and when such contest is filed the ballots become evidence for all proper purposes, though they were not produced and proved within the time provided by statute for the taking of proof in the case.

114	312
f123	541
e123	874

114	312
125	779

114	312
f138	282
138	283
138	613

2. Where, in an election contest, the circuit judge appointed two commissioners to recount the ballots, it was error for the commissioners to refuse to permit the parties interested and their representatives to be present during their sessions.
3. Where the ballot boxes containing the ballots voted at an election were in the possession of the county clerk, whose re-election was also in contest, and the ballot boxes, though locked, could have been entered by taking off the hinges, which were exposed, the ballots should not be used to rebut the presumption of the correctness of the official returns until it had been satisfactorily proved that the ballots had not been tampered with since the election, and that those offered in evidence were the identical ones cast.
4. Where, in an election contest, the ballots had been counted by commissioners appointed by the court, it was error for the court to refuse to allow the defendant to file an amended answer charging that the ballots had been altered and changed, and that unauthorized and interested persons had access to and opportunities for changing them, and that, therefore, they were not the same ballots counted and certified by the election officers, such objection not being a ground of counter contest required to be set up in the answer, but merely a matter affecting the evidence offered on the grounds already alleged.
5. Acts Gen. Assem. 1900, Ex. Sess., p. 18, section 10, requires that disputed ballots shall be placed in a linen envelope, sealed up, and across the seal the officers shall write their names, and shall place the county election seal in hot wax thereon, and return the same to the clerk of the county court with the election returns, with a true statement as to whether they have or have not been counted, and, if counted, what part, and for whom. HELD that, where disputed ballots were inclosed, but no statement was made as required by the closing clause of such section except the words written on the back of each ballot, "Not counted. Questioned. W. H. Hack," such ballots were not properly preserved, and could not be counted in a contest.
6. An idiot is not a competent witness and not a legal voter, but where one was permitted to vote, his vote should not have been deducted from either candidate, because there was no sufficient evidence to ascertain for whom he voted.
7. Where a person of unsound mind was permitted to vote, and the day succeeding the election he was found by a jury to be of unsound mind, and directed to be confined in an asylum, evidence as to his previous party affiliation was insufficient to show how he voted at such election, so as to justify the deduction of his vote from a candidate of that party.

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8. Under Kentucky Statutes, section 1478, providing that a voter's residence is where his habitation is, and to which, when absent, he has an intention of returning, and that he shall not lose his residence by absence for temporary purposes, an unmarried man, a resident of E. county, did not lose his residence therein by going to Indiana to work, with an intention of returning, where he in fact returned to E. county within a few months, and was living there when the election occurred.
9. Where a resident of Kentucky removed to Indiana with his family, and expressed his intention to remain there permanently, he thereby lost his voting residence in Kentucky, though he afterwards changed his intention, and returned to Kentucky within a year prior to the election.
10. A school census is not admissible in an election contest to show that persons voting at the election were minors at the time of the election.
11. Where a voter testified that he sold his property, and removed his home from one election precinct to another, on September 12, 1901, he was not entitled to vote in the precinct to which he removed at an election held November 5th, he not having resided therein sixty days.
12. Where a ballot was marked with a pencil within the circle under the device under which defendant was a candidate for county attorney and cross-marks were made with a stencil in the squares after several of the candidates, but none after the name of any candidate for county attorney on the opposite ticket, the pencil mark was sufficient to require the ballot to be counted for all candidates, including county attorney, under the emblem, except as to those candidates where the stencil mark was made opposite the names of candidates of other tickets.
13. Where a ballot was marked under both the party devices and also opposite contestant's name, such marking indicated an intention not to vote either party ticket, but to vote for a contestant alone.

W. B. GAINES, JOHN E. DuBOSE AND EDWARD W. HINES, FOR APPELLANT.

We claim that the court erred:

1. In counting two ballots returned from Durbin precinct in an envelope each of which was marked "not counted, questioned, W. H. Hack." No other statement was made. The fact that the election officers wrote their names across the seal of the envelope containing these two ballots is not a compliance with the law and does not amount to a certificate, and is not a "true statement" in the meaning of the statute and is not evidence that the person depositing them were not allowed to vote.

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2. Cook and Skaggs having been permitted to vote the burden was on contestant to prove they were under age, and the statement of the county clerk that the school records in his office show both were born in 1881 was incompetent evidence as these are not such records as are admissible to prove one's age.

3. While we concede that if the ballots used in the election are properly preserved and introduced in evidence, they outweigh the returns made by the officers of the election, we contend that before they can be considered, they must be filed and introduced in evidence and made part of the record which was not done in this case.

4. The report of the commissioners appointed by the court to count the ballots, does not show where they found or counted them, or in whose possession they were or what they did with them when they finished their labors, and they did not file them in the clerk's office or make them a part of the record.

5. The lower court having considered these ballots in evidence, although not shown to have been properly preserved or filed, or made part of the record, or their integrity established, the contestee alleged and proved that they had been tampered with, but his amended answer alleging this and his affidavits proving it were rejected by the court who refused to permit either to be filed.

AUTHORITIES CITED.

Banks v. Sargent, 104 Ky., 849; Tunks v. Vincent, 106 Ky., 829; Fenton v. Scott and Hartman v. Young, 17 Oregon, Am. St. Rep., vol. 2, pp. 737 and 801; Tebee v. Scott, Cal. Book, 29, p. 673, L. R. A.; Powell v. Holeman, 50 Ark., 85; McCrary on Elections, p. 293; 10 Am. & Eng. Enc. of Law, 2d Ed., p. 829.

WILLIAM CROMWELL AND M. HAZELIP, FOR APPELLEE.

WILKINS & LAY AND D. W. WRIGHT, OF COUNSEL.

1. The law does not require impossibilities and therefore plaintiff could not file the ballots with his petition. He did all he could which was to refer to and make them part of his petition.

2. The court by an order appointed two commissioners and directed that they take charge of the ballot boxes there in the possession of the county court clerk and open them and examine, canvass, compare and count all the ballots found therein and report the condition of the boxes and ballots including those questioned or rejected, etc.

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3. This practice has been approved by this court in *Bailey v. Hurst*, 24 Ky. Law Rep., 506.

4. It is conceded that the ballots themselves are more reliable than a mere summary made from them.

5. There were no objections or exceptions filed to the reading of the school census reports proving the nonage of two of the voters and it is too late to except thereto in this court.

AUTHORITIES.

Acts 1900 approved October 16, 1900. *Bailey v. Hurst*, 24 Ky. Law Rep., 506; 10 Am. & Eng. Ency., 831 and notes; *People v. Holden*, 28 Cal., 133; Civil Code of Practice, sec. 757; Kentucky Statutes, sec. 1471; Laws of Illinois of 1891; *Parker v. Orr*, 30 L. R. A., 227; *Caldwell v. McElvain*, 56 N. W. Reporter, 1014; *Pettit v. Yewell*, 24 Ky. Law Rep., 566; *Funks v. Vincent*, 21 Ky. Law Rep., 476; *Corn v. Sims*, 3 Met., 397; *Chiles v. Boone*, 3 B. M., 88; Kentucky Statutes, subsec. 4, sec. 1478; *Spencer v. Society of Shakers, &c.*, 23 Ky. Law Rep., 856; *McCrary on Elections*, sec. 474; *Hardin v. Cress, &c.*, 24 R., 512; Am. & Eng. Ency. of Law, 424, 425.

OPINION OF THE COURT BY JUDGE O'REAR—REVERSING.

This contest involves the election to the office of county attorney of Edmonson county. The election was held in November, 1901. On the face of the returns as certified to by the officers of election, appellant had a majority of 19 votes. Within the time allowed by statute, appellee filed a petition in the Edmonson circuit court, in which the validity of the certificate awarded by the election commissioners to appellant was attacked upon two general grounds. One was that the officers of election of each of the precincts in the county had fraudulently or mistakenly counted votes for appellant which in fact had been cast for appellee. The other was that illegal voters had been allowed to vote in certain precincts, and had voted for appellant, and that, when the errors or frauds first mentioned were corrected, and the returns were purged of the illegal votes last mentioned, the result would have been that appellee would have

received a majority, and therefore did receive a majority of the legal votes cast at that election for the office of county attorney. Appellant, within the time prescribed also by the statute, filed an answer containing counter charges of a somewhat similar nature. The charges were not as specific, probably, in either instance, as they should have been, but the parties seem to have joined an issue, and to have developed the case by proof upon the averments as made. After the time allotted by statute for the introduction of proof by the respective parties had expired, and at a succeeding term of the circuit court, the judge of the court, upon his own motion, appointed two commissioners—one selected, it is said, from each of the political parties represented by the claimants to the office in dispute—whom he directed to begin upon a day certain, named in the order, to then count the ballots, which were preserved in the county court clerk's office, and which had not been filed in the circuit court up to that time, so far as the record discloses. Exceptions were saved to each party by the order of the court. The commissioners so appointed, having procured the keys to the ballot boxes from the circuit judge, met upon a day subsequent to that first fixed in the order, and proceeded to count the ballots. They declined to permit either of the parties to be present at the count, and refused admission to all others. They reported to the court the result of their labors, in which they stated that they found that the ballots in the ballot boxes showed that appellee had received 950 votes, and appellant had received 948. This did not take into account any of the ballots returned by the election officers as questioned. The officers of election had certified by certificates regularly and duly entered on the night of the election at the close of the polls that appellee had received 935 votes and appellant 954 votes for the office

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in question. How the discrepancy occurred is not explained. Exception to the report of the commissioners was sustained upon a ground not now material. Thereupon the court, a special judge presiding, the regular judge having declined to sit in the case, ordered the ballots brought into court, and then proceeded, in the presence of counsel and the parties, to count the ballots. The result of that count was that each of the litigants was found to have received 949 of the unquestioned ballots.

The first question presented by this appeal is whether, in the first place, the ballots were properly before the court as evidence, and, in the second place, whether the court's action concerning the custody, inspection and counting of the ballots was authorized by law. For appellant it is insisted that the ballots, not having been produced and proved within the time provided by the statute for the taking of proof in the case, could not be subsequently introduced, because to so allow would be to permit the introduction of evidence for the party so using them after the time allotted by the statute for that purpose. The court is of opinion that it was the purpose of the Legislature, in enacting the law providing for the preservation of ballots, and providing that they should be locked in boxes with separate locks, so that the keys to one should be in the hands of the officers of the precinct of one of the political parties, and the keys to the other lock in the hands of the officers of the other political party, and that, in the event of a contest, the keys were to be delivered by such officers to the judge of the circuit court of the circuit having jurisdiction of the case, to make such ballots evidence of the first importance in a contested election. When such a contest is filed, the ballots become evidence by that fact for all proper purposes before the trial court, to be introduced and consid-

ered upon such issues as may be legally joined under the provisions of the act. We therefore decide that it was proper to consider the ballots on the determination of the questions in issue in this case in so far as they shed light thereon, and subject to the rule announced below.

Whether the court should have appointed commissioners to aid it in tabulating and counting the ballots is a matter not entirely free from doubt. It may well be argued that the duty of canvassing returns of an election can only be exercised by those officials specifically charged with it, who are, in the first place the officers of election of the several precincts; then the commissioners of election of the county; and then, in the case of contest, the circuit court upon whom jurisdiction is conferred by the statute. The expression in that act that "the action shall proceed as an equity action" would seem to have reference more especially to the manner of the production of evidence, which is by deposition exclusively under the Civil Code, in equitable cases, and dispensing with the jury; for in no other particular do the actions appear to be tried as equitable actions. In fact, in many particulars, noticeable in the terms of the statute, they are quite dissimilar from equitable actions. From the expression above referred to it has been thought that the court found its power to appoint commissioners. But whether this is true or not, it was not proper for the commissioners to have excluded the parties and their counsel from the proceedings when they were opening and canvassing the returns in litigation, nor was it regular or proper for them to have held a secret meeting for that purpose, however pure may have been their intentions. Certainly, the parties to the litigation, in person or by counsel or both, were entitled to witness, not merely the opening of the ballot boxes and the envelopes containing the ballots, but also

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to inspect their condition, and verify the actions of the commissioners. Such an arbitrary right should not be, and we hold is not, vested anywhere, with respect to the returns of an election. The rule may be stated to be that, where the ballots are preserved so that their identity is assured, they can be counted during a contest; and they are undoubtedly better evidence of the vote cast than the returns, and should prevail where there is a difference. *Hughes v Holman*, 23 Or., 481, 32 Pac., 298; *Owens v. State*, 64 Tex., 500; *People v. Holden*, 28 Cal., 123. But before a recount of the ballots should be allowed to rebut the presumption of the correctness of the official returns, it should be proved satisfactorily that the ballots had not been tampered with since the election, and that those offered in evidence are the identical ones cast. On this point it was said in the case of *People v. Holden*, 28 Cal., 133: "We must presume that the officers of election honestly performed their duty in the premises; that they did not mutilate any of the ballots, but, on the contrary, strung them, in the condition in which they were found in the ballot box, on a thread, and sent them in that condition to the clerk's office. The same presumption exists in relation to their custody by the clerk. . . . The Legislature could have had no other design in thus providing for the preservation of the ballots than to make them evidence of their own contents, and a test of the correctness of the returns made up from them by the officers of the election. They are in fact made a part of the returns, for it is expressly provided that they shall be sealed up with the poll list and tally paper, with the certificates of the officers attached, and indorsed 'Election Returns.'" That presumption of integrity of the ballots can not attach, however, until it is first shown that they came from the officer whose duty it is by law to have and

preserve them, and that they are apparently in the condition of preservation prescribed by the statute. When that much is shown, the legal presumption as to their integrity attaches. On the contrary, however, if it be shown either that they have been tampered with, or that access has been afforded to them to persons unauthorized by law, then the burden shifts, and it thereupon becomes the duty of the person offering and relying upon such ballots to prove affirmatively not only that they are the identical ballots cast in the election, but they have not been mutilated, changed nor tampered with. In *People v. Livingston*, 79 N. Y., 288, it was said: "The statute requires the ballot boxes to be preserved undisturbed and inviolate, and it is incumbent upon the party offering the evidence to show that they had been so kept; not beyond a mere possibility of interference, but that they were intact to the satisfaction of the jury. The burden was upon the relator to satisfy the jury that the boxes had remained inviolate. The returns are the primary evidence of the result of an election. They are made immediately upon canvassing the votes, and the votes are canvassed at the close of the polls, in public, and presumably in the presence of the friends of both parties. . . .

After the election it is known just how many votes are required to change the result. The ballots themselves can not be identified. They have no earmark. Everything depends upon keeping the ballot boxes secure, and the difficulty of doing this for several months, in the face of temptation and opportunity, requires that the utmost scrutiny and care should be exercised in receiving the evidence. Every consideration of public policy, as well as the ordinary rules of evidence, require that the party offering this evidence should establish the fact that the ballots are gen-

uine. It is not sufficient that the mere probability of security is proved, but the fact must be shown with a reasonable degree of certainty. If the boxes have been rigorously preserved, the ballots are the best and highest evidence, but, if not, they are not only the weakest, but the most dangerous, evidence." Judge Cooley, in his work on Constitutional Limitation (625), announces substantially the same rule. Also, see *People v. Sackett*, 14 Mich., 320; *People v. Cicott*, 10 Mich., 283, (97 Am. Dec., 141). The authorities are abundant that, where ballots have been so exposed as to have offered opportunity to be tampered with, and have not been guarded with that zealous care which will contravene all suspicion of substitution or change, they lose their presumptive purity, and are no longer to be relied on as evidence in a contest or judicial inquiry as to the result of an election. *McCrary, Elect.*, 475, etc.; *Powell v. Holman*, 50 Ark., 94, 6 S. W., 505; *Hudson v. Solomon*, 19 Kan., 177 (opinion by Brewer, J.); *Hartman v. Young*, 17 Or., 150 (20 Pac. 17, 2 L. R. A., 596, 11 Am. St. Rep., 787).

Another fact in this case is that at the same general election in Edmonson county out of which this contest grows the office of the clerk of the county court was also in contest; that is, the incumbent, who had received the certificate, and who continued in office, having the custody of the ballots in question, was interested in the result and condition of these ballots, because his office was also then being contested. The ballot boxes, though locked, it is suggested, were wooden boxes, so constructed that they could have been entered by the use of a screwdriver, taking off the hinges, which were exposed. In *Albert v. Twohig*, 35 Neb., 563, (53 N. W., 582), it was said that, although "the ballots cast constitute the primary evidence to determine the rights of

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the respective parties, it must appear, however, that they have been preserved substantially in the manner and by the officers prescribed by the statute. If they have been placed in a position to be tampered with by interested parties, the burden of proof is on the party offering them in evidence to show that they are in the same condition as when sealed by the several election boards. And, in the absence of such proof, it was held that the ballots were properly rejected as evidence." In this case, after it had become apparent that the court was going to count the ballots, which had been in the hands of the commissioners, appellant offered to file an amended answer, in which he charged that the ballots had been altered or changed, that unauthorized persons and interested persons had access to them, and opportunities for changing them, and that, therefore, they were not the same ballots that had been counted and certified by the officers of election. This amendment was rejected by the court, doubtless upon the theory that the statute governing the pleadings in this particular class of cases requires that the grounds of contest shall be stated in the petition, and those of counter contest shall be stated in the answer, and that none other shall be considered by the court. In its strict sense this is not a ground either of contest or of counter contest, but is a matter affecting the evidence offered on the grounds already set out. The court is of opinion that the pleading should have been allowed, and the facts stated therein should have been permitted to be proved, even without the pleading.

From these authorities this court holds: That the ballots cast in an election are the primary and best evidence of the voters' will as expressed therein, and that in case of a contest, as between the certificates of the officers of election and the ballots, the ballots are the best evidence, but

that this is conditioned strictly upon the fact that the integrity of the ballots is clearly established; otherwise the certificate of the officers of election should prevail. *Railey v. Hurst*, 24 R., 504 (68 S. W., 867). That when the ballots are produced from the custody of the officer, whose duty it is to preserve them, are shown to have been preserved from intermeddling from unauthorized persons, and are apparently unchanged, they will be received as evidence of what they may show upon their face; but where they may have apparently been tampered with, or where opportunities have been afforded to unauthorized persons, or to persons interested to tamper with them, then the burden is upon the party producing and relying upon such ballots to establish their integrity clearly and satisfactorily by the evidence. In this case the court erred in receiving the ballots as conclusive under the circumstances recited, and as better evidence than the certificates of the officers of election. However, in view of the conclusion to which we have arrived upon other points, the case will not be remanded for a new trial because of this fact, for the reason that to do so would be only to afford an opportunity to the successful party to increase his majority already established.

There was a number of so-called "questioned" ballots returned by the officers of the election, there being some from every precinct in the county, excepting perhaps one. The certificates required by the statute to be attached to these questioned ballots was not attached in any instance. The statute on this point reads as follows (Act to Further Regulate Elections, Acts Gen. Assem. 1900, Ex. Sess., p. 18, section 10): "That if there are any ballots cast and counted or left uncounted, concerning the legality or regularity of which there is any doubt or difference of opinion in the minds of the judges of the election, said ballots shall be

placed in the large linen envelope furnished by the county clerk for that purpose, and sealed up, and across the seal thereof the officers of the election shall plainly write their names, and at the point of the seal indicated for that purpose the judges of the election shall, in the presence of the clerk and sheriff, place the county election seal in hot wax, as above described, so that it can be plainly read, and the same shall be returned to the clerk of the county court with the returns of the election, for such judicial or other investigation as may be necessary, with a true statement as to whether they have or have not been counted, and if counted, what part and for whom." The learned trial judge rejected all of these contested ballots except two, because the statement required by the closing clause of the section of the statute above quoted was not made. As to the two excepted, and which he counted for appellee, the only statement as to how they were voted was this, written on the back of each ballot: "Not counted. Questioned. W. H. Hack." Hack was the clerk of the election at that precinct. These ballots were inclosed in an envelope, and the envelope was indorsed as required by the statute—that is, the officers signed their names across the seal on the envelope, which had been sealed with wax, and stamped; but there was no other statement as to how these ballots were voted, save the one of the clerk above quoted. Now, was the statute complied with as to the certificate required by the statute showing how they were counted, or whether at all counted, by the officers of the election. In *Struss v. Johnson*, 100 Ky., 319 (18 R., 771) 38 S. W., 680, this identical question of certificate was under consideration. The court held that this provision of the statute was mandatory, and that, "to render doubtful or questioned ballots admissible as evidence in a judicial or other investigation, we are

of opinion that they must be sealed, and returned with the statement of the officers of election, as required by the statute." This was followed in *Banks v. Sergeant*, 104 Ky., 849 (20 R., 1024) 48 S. W., 149, and *Anderson v. Likens*, 104 Ky., 699 (20 R., 1001 (47 S. W., 867)). We are of opinion, therefore, that the court erred in counting the two ballots in question.

Among the illegal votes cast at this election was one cast by Lewis Hill, who is conclusively shown to have been an idiot. Copies of inquests finding him such were produced in evidence. Under the Constitution and statutes of this State idiots and lunatics are not permitted to vote, and this person should have been excluded from the polls. The trial court, upon the evidence, which we will notice, deducted his vote from appellant. That evidence was that this person claimed to belong to the same political party of which appellant was the nominee, and that afterwards the idiot had stated that he had voted the straight ticket of that party. On the other hand, appellant proved by another witness that, while the idiot had told him that he had voted the straight ticket of the party, yet, when describing how he voted that ticket, he showed that he voted it by placing the stencil mark under the emblem of the opposite party. Manifestly, the statements of this idiot should not have been received, or, if received at all, the result is that each cancels the other. What a voter may say after the election, and after he has voted, as to how he voted, is at best but hearsay. An idiot, of course, is one who is destitute of mind, and has been since his birth. Such a person would not be competent as a witness. Certainly, his statement out of court could have no more legal force than his statement made in court under oath. We are of opinion that the court erred in deducting this vote from appellant.

George Parsley is shown to have voted at this election. It was claimed that at the time he was a lunatic. Two questions in his case are therefore presented: First, was he disqualified? and, second, how did he vote? The evidence is conflicting as to the state of his mind on the day of the election. One witness gave it as his opinion that he had not mind sufficient to know the nature of a vote or to transact business. Another, on the other side, gave it as his opinion that he was competent and qualified. Another gave his opinion that he was disqualified, and he judged that fact from what the voter said, and detailed what the voter said. The matter detailed does not of itself show him mentally deranged. The evidence is substantially the same, as to the mental capacity of this witness, as was shown in regard to that of his father and brother, all of whom had at times been afflicted with this unfortunate malady; and all of whom had at times been confined in asylums for the insane. All of them, however, had, previous to this election, been discharged. On the day following the election, this voter was, by a verdict of a jury in a trial then had and that day begun, found to be of unsound mind, and was directed to be confined in an asylum. When his malady reappeared so as to justify this action does not appear, independent of the testimony above referred to. The question whether he is a competent voter is not entirely free from doubt. The political affiliation of this voter, so far as he had always claimed to have one, was proved. Other than this there is no evidence in the record as to how he voted. This court held in *Tunks v. Vincent*, 106 Ky., 829 (21 R., 475) 51 S. W., 622, that the declarations of a voter, made after the election, as to how he voted, were incompetent as hearsay. In that case, however, it was held that, if the voter was placed upon the witness stand as a witness, and

was willing to state how he voted, but the opposite party interposed an objection, and told him that he need not answer unless he wanted to, and that thereupon the witness refused to answer, these facts, coupled with the further proof of his party affiliation, that he had been an active and strenuous partisan, were sufficient circumstances to justify the finding that the witness had voted for that party with whom he had affiliated, and whom he had accommodated by refusing to answer a question which he had previously expressed a willingness to answer. In this case, however, a number of these elements are lacking. The only fact that would indicate how this voter voted is the one of his previous party affiliation. Now, if he was insane, and so insane as to be classed as a lunatic—that is, did not have mind sufficient to know or to comprehend his act, or will power to control it,—it is as probable that he voted against as for his party affiliation; at least there is no reasonable probability that could be ascribed to his secret conduct when in such deranged condition because of his judgment and opinions entertained when in a rational and sane state of mind. We know as a matter of fact that lunatics frequently, if not generally, do exactly the contrary, while insane, to what they would have done when of sound mind. It is the opinion of the court that the trial court improperly deducted this ballot from appellant.

Virgil S. Wolf voted for appellant. His vote was deducted by the trial court because it found that he was an illegal voter. The facts appear to be that he was an unmarried man, and had previously lived in Edmonson county, in the precinct in which he voted, but had some time during that year gone to Evansville, Ind., to work. He remained there a few months, returned to Edmonson county, and was living there when this election occurred. The

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voter testified that when he left Kentucky he left with the intention of returning; that he then claimed, and has always since claimed, Edmonson county as his home; and that while in Indiana he did not vote there, and did not claim his residence there; that his absence was but temporary. His brother testified that the voter had previously made his home with him, and had returned to his place, and was making his home there before and at the time of the election, and that before he left for Indiana he expressed an intention to retain his residence in Edmonson county. Section 1478 of Kentucky Statutes regulates this question of residence. The first subsection is: "That shall be deemed his [the voter's] residence where his habitation is, and to which when absent he has the intention of returning. He shall not lose his residence by absence for temporary purposes merely." The court is of the opinion that this witness was a legal voter at this precinct.

Stanley S. Minton is shown to have voted for appellant. Previous to the election he had removed to Indiana with his family, and expressed his intention to remain there permanently. Afterwards he evidently changed his intention, and returned to Edmonson county, but within a year before the election. His vote was deducted from that given to appellant, and, we think, rightfully.

James Cook and Andrew W. Skaggs voted, evidently, for appellant. Their votes were deducted upon the theory that they were minors at the time of the election. The only evidence before the court that they were minors was the testimony of the county court clerk that a school census on file in his office showed that each of these voters was born within twenty-one years before the date of the election. The court is of the opinion that this school census is not evidence of the date of the birth of these people for any other

purpose than school purposes. Who gave it to the school assessor or trustee, and who reported it, was not shown; nor, indeed, was the report of the census itself offered in evidence. It was merely the clerk's statement of what he had found the state of the record to disclose. The court is of opinion that these two votes were improperly rejected.

Marcellus Bailey is shown to have voted for appellee. Within sixty days before the election he removed from the precinct in which he had been living for some months into another precinct, in which he had not lived, and voted in the latter precinct. He is the only witness on the subject. He testifies that he did not move until the 12th of September, 1901 (the election occurred on the 5th of November); that on the 12th of September, he sold his property, and removed his home. This vote was not excluded from appellee, but should have been.

Rufus Tartar is shown to have voted for appellee, and the court deducted the vote upon the ground that he was an illegal voter. No complaint is made that this action was not proper. The record is pretty clear that he was an illegal voter. The facts in the case of this voter are substantially the same as Stanley S. Minton's, above discussed.

There was one ballot rejected that had been marked thus: The cross-mark was made with a pencil within the circle under the device under which appellant was a candidate. Then cross-marks were made with the stencil in the squares after several of the candidates, but none after the name of any candidate for county attorney on the opposite ticket. The court has held in the cases of *Houston v. Steele*, 98 Ky., 596 (17 R., 1149) 34 S. W., 6, and *Graham v. Graham*, 22 R., 123 (68 S. W., 1093), that a mark with a pencil at the point where the stencil should have been made is equivalent to a mark with the stencil. It would, therefore,

appear that this mark was sufficient in law to have voted the ballot for all of the candidates, including county attorney, under the ticket under the emblem of which the pencil mark was made, except as to those candidates where the stencil mark had been made opposite the names of the candidates of the other ticket. One ballot was counted for appellee which had been marked under both of the party devices or emblems, and also opposite the name of appellee. By marking his ballot so he indicated an intention, as shown, in our opinion, to not vote either party ticket, but to vote for the person alone opposite whose name he had marked. The ballot was properly counted.

There are other questions presented in the record, but which do not appear to affect the result, and which are not argued in briefs. We refrain, therefore, from discussing them. The result is that appellant received a majority of the legal votes cast for the office of county attorney, and the judgment should be rendered accordingly.

The judgment is reversed, and the cause remanded for proceedings consistent herewith.

(June 20, 1903.)

Response by Judge O'Rear to petition for rehearing:

The very earnest petition for a rehearing has induced a careful re-examination of the record, and that by other judges than the one who wrote the opinion. As the result, the court concludes to adhere to the former opinion. However, there are two matters, unimportant as affecting the result, or any conclusion of law announced, that we desire to correct. We do not, and did not, intend, by anything said in the opinion respecting the action of the two commissioners who canvassed the returns, to intimate that they were actuated by other than perfectly honest motives, or

that their count of the ballots was not absolutely fair. The order appointing the commissioners recites that "this order is made without prejudice to the rights of either party." This the court construed into being a formal exception, though it appears the order was indorsed "O. K." by one of the parties and by the attorney of the other. It is said this operated as a consent to the order, and perhaps it did.

Lewis Hill and George Parsley were held by the lower court to be illegal voters. But their votes were not deducted, because there was not sufficient evidence in the opinion of the trial judge as to how they voted to authorize it. Hill, we held to be an illegal voter, but as to Parsley we did not decide whether or not he was a legal voter. We concluded, also, that there was not sufficient evidence as to how they voted to warrant the deduction of their votes from those of either candidate. It is due to the trial judge to say that the result of his finding respecting these two votes is sustained; but, as neither he nor this court rejected those votes, the result is not affected.

The petition for rehearing is overruled.

Judge Settle not sitting.

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CASE 39—ACTION BY J. N. McNAUGHTON AGAINST THE CITY OF LOUISVILLE TO RECOVER FOR STREET IMPROVEMENT.—DEC. 10.

City of Louisville v. McNaughton.

APPEAL FROM JEFFERSON CIRCUIT COURT.

JUDGMENT FOR PLAINTIFF AND DEFENDANT APPEALS. AFFIRMED.

STREET IMPROVEMENTS—WRITTEN CONTRACT—LIMITATION.

Held: Kentucky Statutes, section 2515, relating to limitations of actions after five years, by its provisions applies to actions created by statute, but not to actions upon a writing. **Held,** not to apply to a contract between a city and a contractor for a street improvement, wherein the city in writing agreed to pay for so much of the cost as was not collectible against the abutting owners, such action not being an action created by statute, but one on a contract in writing, governed by the fifteen-year statute of limitations.

HENRY L. STONE, FOR APPELLANT.

We contend that appellee does not state a cause of action against appellant. By his own statement he was not the owner of the apportionment warrant at the institution of this suit as his assignees, the real parties in interest, were not made parties to the action. Furthermore, the petition shows on its face that it is barred by the statute of limitations, as the apportionment warrants were issued more than five years before the institution of this suit, and the cause of action growing out of an implied contract or liability created by statute, is barred by the five-year statute of limitation. *L. & N. R. R. Co. v. Hodge*, 6 Bush, 141; *Same v. Orr*, 91 Ky., 109; *Stillwell v. Leavy*, 84 Ky., 379; *Fidelity Trust & S. V. Co. v. Vorles' Exr.*, 61 S. W., 474; *Kerwin v. Nevin*, 64 S. W., 647; *McNaughton v. In. School of Reform*, 19 R., 1695; *Civil Code*, sec. 734.

LANE & HARRISON, FOR APPELLEE.

PROPOSITIONS INVOLVED AND AUTHORITIES CITED.

1. Wherever the city of Louisville is invested with the power to have the public ways located therein improved by the original construction thereof, but is without authority by any step or action it can take to impose the cost of the construction of such improvement upon the lands contiguous thereto, the city

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must, in every such case, pay to the contractor the cost of such construction. *Caldwell v. Rupert*, 10 Bush, 184; *Louisville v. Nevin*, 10 Bush, 551-552; *Craycraft v. Selvage*, 10 Bush, 704, 5 and 6; *Louisville v. Leatherman*, 18 Ky. Law Rep., 124; *Louisville v. McNaughton*, 19 Ky. Law Rep., 1695.

2. Where the caption of the petition sets out the names of all the persons who are the plaintiffs, those suing and those for whose use the suit was brought, and where, in the body of the petition they all unite as plaintiffs, all such persons thereby become parties plaintiff to the action, and are bound by the judgment. *Fenwick v. Phillips*, 3 Metcalf, 87; *Neely v. Marrett*, 9 Bush, 350; *Revell v. Claxton*, 12 Bush, 562.

3. The liability of a municipal corporation for the cost of improving public ways therein must rest and can only rest in a contract by the corporation with a person undertaking to construct the improvement. *Murphy v. Louisville*, 9 Bush, 194; *Henderson v. Lambert*, 14 Bush, 29.

4. The liability of a property owner to pay the cost of improving a public way does not rest in contract. The property owner is not a party to the contract, but he is made to pay alone by reason of the statute, and the liability is one imposed by the statute. *Gosnell v. Louisville*, 20 Ky. Law Rep., 522; *Kirwan v. Nevin*, 23 Ky. Law Rep., 905.

5. An apportionment warrant is not necessary to the enforcement of a liability imposed by the statute upon the property owner for the cost of improving the public way, nor is an apportionment warrant made evidence of any disputed facts in an action to enforce the lien given for such liability. *Fehler v. Gosnell*, 18 Ky. Law Rep., 241; *Preston v. Roberts*, 12 Bush, 516-517.

OPINION OF THE COURT BY JUDGE PAYNTER—AFFIRMING.

The city of Louisville entered into a contract, evidenced by a writing, with the appellee, by which he agreed to improve a certain street by original construction. The city agreed that he was to have a certain compensation for the improvement which he contracted to make. The city was authorized to make the contract, but a controversy arose with the abutting property owners as to their liability for the cost of construction. It culminated in a suit which reached this court, where it was held that the abutting property owners were not liable for the cost of construction.

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City of Louisville v. McNaughton, 19 R., 1695, 44 S. W., 380. Following many other cases, this court in that case held that, as the city had ordered the improvement made, and accepted same after it was completed, it was liable to the contractor for so much of the cost of improvement for which he could not have a lien upon the abutting property. McNaughton failing to recover \$2,760.52 from the abutting property owners, he brought this action against the city to recover the same.

It is argued that because this court has held the five-year statute of limitations applies to actions against abutting property owners for the cost of street improvements (section 2515, Kentucky Statutes; Kirwin v. Nevin, 111 Ky., 682 (23 R., 947) 64 S. W., 647), that it likewise applies to an action by a contractor against the city. Section 2515, Kentucky Statutes, does not apply to an action upon a writing, for such action is expressly excepted from its operation. This is not an action created by statute, but it is based upon a written contract which was entered into between the city and the appellee. The city could only be bound when it was authorized to and did make a contract in writing. It is true the city expected the abutting property owners to relieve it from liability by paying the contract price, but the statute did not impose such an obligation upon them. If it had, then it would have been a liability imposed by statute, as they were not the contracting parties. Gosnell v. City of Louisville, 104 Ky., 201 (20 R., 519) (46 S. W., 722); Kirwin v. Nevin, *supra*. In effect, the city, by its contract in writing, agreed that, if the abutting property owners did not pay the contract price, it would do so. As this is an action on a contract in writing, the 15-year statute of limitations applies.

The judgment is affirmed.

Ruff v. Baumbach.

CASE 40—ACTION BY GEORGE BAUMBACH AS GUARDIAN AGAINST MICHAEL RUFF AND OTHERS FOR CONSTRUCTION OF THE WILL OF GALLAS RUFF, DECEASED.—DEC. 12.

Ruff v. Baumbach.

APPEAL FROM JEFFERSON CIRCUIT COURT, CHANCERY DIVISION.

JUDGMENT FOR PLAINTIFF AND DEFENDANTS APPEAL. AFFIRMED.

WILLS—CONSTRUCTION—DEVISE TO CHILDREN THEN LIVING—DEATH OF DEVISEE LEAVING CHILDREN.

- Held: 1. Kentucky Statutes, section 2064, provides that when a devise is made to several as a class, or as joint tenants, if a devisee die before testator, leaving issue, the share of such devisee shall go to his descendants, unless a different disposition is made by the deviser, and that a devise to children embraces grandchildren, when there are no children, and no other construction will give effect to the devise. Section 4841 enacts that if a devisee dies before the testator, or is dead at the making of the will, leaving issue who survive the testator, such issue shall take the estate of the deceased devisee, unless a different disposition is made or required by the will. HELD, that where testator left an estate to his wife for life, then to be equally divided "between my children then living," but one of his children died before testator's death, leaving issue, such issue were entitled to the share of such child.
2. The right to dispose of property by will is a statutory one and the language of the will must be considered in connection with the statutes; the use of the words "then living" by the testator does not manifest an intention to exclude the descendants of those who may be dead, and they are entitled to stand in the shoes of their ancestor in the division of the estate.

WM. MARSHALL BULLITT, FOR APPELLANTS.

The provision of the will in controversy is in these words:

"All the balance of my estate, real, personal and mixed, I will, bequeath and devise to my beloved wife, Teresa Ruff, during her life and widowhood, and after her death I devise, will and direct that the same shall be equally divided between *my children then living.*"

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Our contention is:

1. The testator devised his estate to his wife for life with remainder to such and only such of his children as should still be living at the time of his wife's death, thereby excluding his grandchildren who were the issue of a pre-deceased daughter, Mary Baumbach.

2. The authorities are uniform that testator's devise to his wife "during her life" and "after her death," to his children "then living," gave a life estate to the wife with a contingent remainder to the children—contingent on their surviving the life tenant; and such and only such children took as were living at the death of the wife, to the exclusion of the Baumbach grandchildren whose parent died even before the testator.

3. The phrase "children then living," used in the will does not include grandchildren who were the issue of a pre-deceased daughter.

4. This case is important as it involves a radical departure from the settled canons of construction. If it is affirmed, it is equivalent to saying that no man can exclude the issue of a deceased child; for if ever a man used apt words to confine his estate to his own offspring it was Gallus Ruff, who, in numerous places showed that he realized the possibility of death, and yet wished his estate to go to his children "living at the time of my death," and again to his children "then living," that is, at the time of his wife's death.

AUTHORITIES CITED.

Howell v. Ackerman, 89 Ky., 22, 27; Johnson v. Jacob, 11 Bush, 646; Boone v. Dyke, 3 Mon., 530; 20 Am. & Eng. Ency. of Law, 942; Underhill on Wills, secs. 557-865; Page on Wills, sec. 546; Neatway v. Reed, 17 Eng. Law & Eq., 153; Low v. Harmony, 72 N. Y., 408; Hill v. Rockingham Bank, 45 N. H., 270; Cheatham v. Gower, 94 Va., 383 (Va.); Olney v. Hull, 21 Pick., 311; Roundtree v. Roundtree, 25 S. C., 450; Mercantile Trust Co. v. Brown, 71 Md., 166; Covey v. McLaughlin, 148 Mass., 576; Van Tilburgh v. Hollinshead, 14 N. J. Eq., 32; Slack v. Bird, 23 N. J. Eq., 238; Smith v. Block, 29 Ohio St., 488; Robinson v. Palmer, 38 Atl., 103 (Me.); Gill v. Barrett, 29 Beav., 372 (1861); Drew v. Drew, 22 W. R., 314; Thompson v. Ludington, 104 Mass., 193; Bragg v. Carter, 171 Mass., 324; Proctor v. Clark, 154 Mass., 45; Colby v. Duncan, 139 Mass., 398; Wood v. Bullard, 151 Mass., 324; Nash v. Nash, 12 Allen, 345; Ringquest v. Young, 112 Mo., 25; Hopkins v. Keaser, 36 Atl., 615 (Me.); Wilhelm v. Calder, 102; Iowa, 342; Patchen v. Patchen, 121 N. Y., 422 (24 N. E., 695); McGillis v. McGill-

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lis, 154 N. Y., 532; Shanks v. Mills, 25 S. C., 358; Phillips v. Beall, 9 Dana, 1; Augustus v. Seabolt, 3 Met., 155; Schouler on Wills, sec. 533; Jarman on Wills, 690; 5 Am. & Eng. Ency. of Law (2d ed.) 1085; Churchill v. Churchill, 2 Met., 466; Phillips v. Beall, 9 Dana, 1; Hopson v. Shipp, 7 Bush, 644; Yeates v. Gill, 9 B. Mon., 203; Hughes v. Hughes, 12 B. Mon., 115; Ewing v. Hadley, 4 Litt., 351; Chenault v. Chenault, 88 Ky., 83; Smith v. Miller, 20 Ky. Law Rep., 910; Dunlap v. Shreve, 2 Duv., 334; Fuller v. Martin, 96 Ky., 500.

GIBSON, MARSHALL & GIBSON, FOR APPELLEES.

Testator's will was made July 15, 1885, and he died in November, 1888. He and his daughter, Mary Baumbach, while driving together were severely injured in an accident. She was almost instantly killed and he lived only three days. His daughter, Mary Baumbach, left surviving her four infant children and her husband, George Baumbach. Two of the children have since died, and it is now claimed that their father, George Baumbach (who inherited the share of the two dead children), and the two living children are entitled to the interest of Mary Baumbach in the estate of her father under his will, and the lower court so decided.

For the appellees it is contended:

1. That the devise of Gallus Ruff was to his children as a class; that Mary Baumbach was a member of this class, and the estate vested in this class *upon the death of the testator* and had she been living at that time she would *then* have been entitled to a vested remainder in her share of her father's property.

2. That, being a member of this class, she was a devisee under the will, as much as if mentioned, in fact, by name, and having died before the testator, her interest in the property descended to her children as provided in section 2064 of the Kentucky Statutes.

3. The testator intended that his estate should go to his children and their descendants and surely no refinements of the law will now be indulged to disinherit these descendants and work a gross and flagrant injustice.

AUTHORITIES CITED.

Smith v. Miller, 20 Ky. Law Rep., 910; Evans v. Henderson, 24 Ky. Law Rep., 303; Ormsby v. Dumesnil, 91 Ky., 605; Mercantile Bank of N. Y. v. Ballard's Assne., 83 Ky., 483; Arnold v. Arnold, 11 Mon., 89; Grigsby v. Breckinridge, 12 Bush, 631; Williamson v. Williamson, 18 B. Mon., 299; Kentucky Stat-

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utes, sec. 2064; Kentucky Statutes, sec. 4841; *Dunlap v. Shreve*, 2 Duv., 334; *Chenault v. Chenault*, 88 Ky., 83; *Fuller v. Martin*, 96 Ky., 501; *Sloan v. Thornton*, 102 Ky., 443.

OPINION OF THE COURT BY JUDGE BURNAM—AFFIRMING.

In November, 1888, Gallas Ruff and his daughter, Mary Baumbach, whilst driving together, collided with a train of cars, which resulted in the instant death of Mary Baumbach, and that of Gallas Ruff three days thereafter. He left surviving him a widow, Theresia Ruff, and four children, Joseph Ruff, Michael Ruff, Caroline Ruff Kienzlen, and Magdalena Ruff Schloemer; and his daughter Mary Baumbach left surviving her four infant children and her husband, the appellee George Baumbach. Shortly after the death of Gallas Ruff, his will was probated in the Jefferson county court. It reads as follows: "I, Gallas Ruff, of Louisville, Kentucky, being of sound mind and disposing memory, do hereby make, publish, and declare this to be my last will and testament: First, I direct that all my just debts and funeral expenses be paid as soon as expedient after my death by my executrix, hereinafter named. Second, I will and devise to each of my beloved children living at my death the sum of \$100.00. Third. All the balance of my estate, real, personal and mixed, I will, bequeath and devise to my beloved wife, Theresia Ruff, during her life and widowhood; and after her death I devise, will, and direct that same shall be equally divided between my children then living. Fourth. I hereby nominate, constitute and appoint my beloved wife sole executrix of this, my last will and testament, as well as guardian of my children, and request and direct that no security be required of her in either capacity. In testimony whereof, witness my name. Gallas Ruff. This 15th of July, 1895." After the death of the life tenant, Theresia Ruff, the entire estate disposed of

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by the will of Gallas Ruff was divided between his four children then living, to the exclusion of the infant children of Mary Baumbach. In October, 1898, the appellee, George Baumbach, instituted this suit against the surviving children of Gallas Ruff and the Fidelity Trust & Safety Vault Company, as guardian of Minnie and George Baumbach, two of his infant children, in which he alleged that two of his children who survived their mother had died, and that he, as their heir at law, and the two surviving children, were entitled to what would have been the interest of Mary Baumbach in the estate of Gallas Ruff, her father, if she had survived him. The defendants answered that by the will of their father his entire estate at the death of the mother belonged to his then living children, and that it had been regularly apportioned between them under a judgment of the Jefferson circuit court. The lower court decided that, at the death of Mary Baumbach, her husband and children became the owners of the share which she would have taken in the estate of her father if she had survived him. And from that judgment the surviving children of Gallas Ruff have appealed.

In construing provisions of wills similar to the one in controversy in this proceeding, this court has held in a number of opinions that they must be construed in the light of sections 2064 and 4841 of the Kentucky Statutes, which read as follows:

"Section 2064. When a devise is made to several as a class, or as joint tenants, and one or more of the devisees shall die before testator, and another or others shall survive the testator, the share or shares of such as so die shall go to his or their descendants, if any; if none, to the surviving devisees, unless a different disposition is made by the deviser. A devise to children embraces grandchildren when

there are no children, and no other construction will give effect to the devise."

"Section 4841. If a devisee or legatee died before the testator, or is dead at the making of the will, leaving issue who survive the testator, such issue shall take the estate devised and bequeathed as the devisees or legatee would have done if he had survived the testator, unless a different disposition is made or required by the will."

It was held in *Renaker v. Lemon*, 62 Ky., 212, *Dunlap v. Shrieve's Exr's*, 63 Ky., 334, and *Chenault's Guardian v. Chenault's Ex'rs*, 88 Ky., 84 (10 R., 840) 11 S. W., 424, that section 4841 of the Ky. Statutes had changed the common-law rule of construction of the word 'children,' so as to embrace grandchildren, unless a different disposition was required by the will. Appellants do not controvert that such was the intention and effect of these decisions, but insist that, by the use of the words "children then living," the testator clearly intended to exclude grandchildren from any participation in his estate. The cardinal rule in the construction of wills, and to which all other rules must bend, is that the intention of the testator, expressed in his will, shall prevail, provided it be consistent with the rules of law. Before the enactment of the statutes quoted supra, the construction contended for would have followed from the plain import of the words of testator; but, as the right to dispose of property by last will and testament is a statutory one, the language of the will must be considered in connection with the statutes. In the case of *Smith v. Miller's Adm'r* (20 R., 910) 47 S. W., 1074, the will provided that at the death of testator's widow his estate should be equally divided among his then living children; and it was held that the testator used the term "children" in the general sense of "issue," and that there was nothing in the will

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to indicate that it was his intention to exclude the descendants of any of his children from an equal division of the property devised. This case is sharply criticised in brief of counsel, but it does not stand alone, as he seems to think, but was substantially followed in the very recent case of *Evans v. Henderson* (24 R., 363) 68 S. W., 640. In that case the devisor gave his estate to his wife for life, and provided that at her death the property should go to his living children, share and share alike. One of the children died after the testator, but during the life tenancy of the widow, leaving children; and it was held that the language of the will was not sufficient to show an intention on the part of the testator to deprive the children of his dead son of the share which he would have inherited had he survived the widow, and that the share of the dead child passed under the will to the grandchildren of testator. It is impossible to distinguish these two cases from the one at bar. They hold that a devise to "living children or surviving children" is simply equivalent to a devise to children, that the use of the word "living" by the testator does not manifest an intention to exclude the descendants of those who may be dead, and that they are entitled to stand in the shoes of their ancestor in the division of the estate.

For reasons indicated, the judgment is affirmed.

Petition for rehearing by appellant overruled.

CASE 41—AGREED CASE BETWEEN THE COMMONWEALTH OF KENTUCKY AND THE COVINGTON AND CINCINNATI BRIDGE COMPANY, INVOLVING THE LIABILITY OF SAID BRIDGE COMPANY FOR FRANCHISE TAX IN KENTUCKY.—DEC. 12.

Commonwealth of Kentucky v. Covington & Cincinnati Bridge Co.

APPEAL FROM KENTON CIRCUIT COURT.

JUDGMENT FOR THE BRIDGE COMPANY AND THE COMMONWEALTH OF KENTUCKY APPEALS. REVERSED.

CORPORATIONS—INTERSTATE BRIDGE—FRANCHISE TAX—VALUATION.

- Held: 1. Where, in an action involving the validity of a franchise tax on an interstate bridge company, there was no showing that there was any difference in value between the part of the bridge within the limits of one State and that within the limits of the other, it will be presumed that the value of the property in each State is in proportion to the length of the bridge therein.
2. Where fifty-nine per cent. of the length of an interstate bridge was within the limits of Kentucky, the valuation of the bridge company's franchise for taxation should be found by taking fifty-nine per cent. of the total value of the stock and bonded indebtedness, and deducting from this amount the assessed valuation of the tangible property of the bridge company in Kentucky.

CLEM J. WHITTEMORE, FOR APPELLANT.

This is an agreed case in which the total value of the bridge company's property is fixed at \$1,330,000, and that fifty-nine per cent. of the bridge is in Kentucky.

Sections 4077 and 4079, Kentucky Statutes, gives the board of assessment and valuation authority to determine the amount of the capital stock, and expressly says this amount, less the tangible property, shall be the value of the corporate franchise. In this case it is agreed that the value and worth, on the market, of the capital stock and bonded indebtedness of the bridge company, was, on September 15, 1900, \$1,330,000. Fifty-nine per cent. of the bridge is in Kentucky and fifty-nine per cent. of \$1,330,000 is \$784,700. The tangible property in Kentucky is valued at \$452,000. This makes the corporate franchise in

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Kentucky, \$332,700. The board only fixed the value of the franchise for 1901 at \$278,349, which is \$54,351 less than it really should have been.

We contend that the fact that the board of valuation may have adopted an improper mode of estimating the value of appellees' franchise, will not vitiate the tax unless the result ascertained was unjust and prejudicial to appellee, and in this case, although prejudicial to appellant, the appellee and not the appellant is complaining.

We think it is clear that the State is entitled to recover the full sum claimed. *Henderson Bridge Case*, 166 U. S., and 99 Ky., 623.

J. W. BRYAN, ATTORNEY FOR APPELLEE.

Under the alleged assessment made by the State board of valuation and assessment of appellee's franchise for 1901, there is a balance due the State of \$464.84, while appellee insists, if the assessment had been made as the courts have held was the proper way, there is nothing due; the same having been paid in full.

We contend that the board of assessment and valuation adopted an arbitrary and illegal method of estimating the value of the franchise by taking the assessed value of the capital stock of appellee for the four preceding years, to-wit, 1897, 1898, 1899 and 1900, and adding them together and taking one-fourth of the total sum, as an average, and fixing that sum as the valuation for 1901.

The proper way to ascertain the franchise tax in Kentucky was to take the whole value of the company's property, \$1,330,000, from this deduct the tangible assessment in Ohio, \$237,984, leaving \$1,092,016. Fifty-nine per cent of this sum is \$644,289, from which deduct the tangible assessment in Kentucky, \$452,000, leaves the value of the Kentucky franchise \$192,289, instead of \$278,349 as fixed by the board. *Henderson Bridge Co. v. Com.*, 99 Ky., 623, 166 U. S., 150; *Louisville Ry. Co. v. Com.*, 20 Ky. Law Rep., 1515; *Henderson Bridge Co. v. Negley, Sheriff*, 23 Ky. Law Rep., 747; *Paducah Street Ry. Co. v. McCracken Co.*, 20 Ky. Law Rep., 1294; *So. Cov. & Cin. St. Ry. Co. v. Town of Bellevue*, 20 Ky. Law Rep., 1509; *Louisville & Jeff. Ferry Co. v. Com.*, 22 Ky. Law Rep., 446.

OPINION OF THE COURT BY JUDGE HOBSON—REVERSING.

This was an agreed case, submitted to the circuit court on the following agreement of facts:

"The defendant, the Covington & Cincinnati Bridge Com-

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pany, is, and was at all times herein referred to, a corporation both in Kentucky and Ohio, it having been incorporated in Kentucky by an act of the General Assembly of the Commonwealth of Kentucky approved (10th) 17th of February, 1846, entitled 'An act incorporating the Covington and Cincinnati Bridge Company,' and having been incorporated in the State of Ohio by an act of the General Assembly of the State of Ohio approved (25th) 26th of March, 1849, entitled 'An act to confirm the charter of the Covington and Cincinnati Bridge Company,' it being specifically empowered by the said special act of the Legislature of Ohio to construct and operate a bridge over the Ohio river, from Cincinnati, in that State, to the city of Covington, in Kentucky, and to charge and collect toll from persons going on such bridge in the State of Ohio, and to purchase and hold real estate in Ohio for the purpose of said bridge, and, when the same could not be acquired by agreement, then to condemn such property in Ohio. Under the power and authority thus conferred in its charter by the Legislatures of Kentucky and Ohio, respectively, defendant constructed, and still owns and operates, a toll bridge over the Ohio river, and extending from Second Street, in the city of Cincinnati, State of Ohio, to Second street, in the city of Covington, State of Kentucky. It, on and before the 15th of September, 1900, owned the real estate therewith connected in the State of Ohio, a part of which it was compelled to and did acquire by and through condemnation proceedings under the laws of the State of Ohio in the courts of that State, in some instances going through the supreme court of Ohio. Said bridge is not, and never has been, a steam railroad bridge, but has been and is used by persons travelling on foot, horseback, and in vehicles; also by street cars. On the 15th of

September, 1900, the total length of this bridge, including approaches, which are a part thereof, was 2,720 feet. Of that there was in Kentucky (to low water mark on the Ohio side of the river) 1,604 feet, leaving 1,116 feet thereof in the State of Ohio; that is, fifty-nine per cent. in length thereof was and is in the State of Kentucky. On the 15th of September, 1900, it made a written verified statement to the auditor of public accounts, as provided by section 4078, Kentucky Statutes, a copy of which is attached hereto as part hereof, marked 'A.' On the 15th of September, 1900, the value of the capital stock of defendant was \$750,000, and such amount was its worth on the market; and it then had an outstanding mortgage bonded indebtedness of \$580,000, being bonds it had issued, and which were and are bearing interest at four per cent. per annum. For the year 1900 it paid a dividend of four per cent. on its said \$750,000 of capital stock, and had not paid a greater annual dividend on said stock for several years prior thereto. The value and worth on the market of its capital stock and the bonded indebtedness on the 15th of September, 1900, was \$1,330,000, and no more. The Commonwealth of Kentucky assessed for taxation for the year 1901 the tangible property of defendant in Kentucky at \$452,000, and it has paid its taxes thereon to the State. The State of Ohio assessed for taxation for that year that part of the defendant's bridge in that State at \$237,984, and defendant has paid to the State of Ohio the taxes thereon. The board of valuation and assessment of Kentucky fixed the value of defendant's franchises for taxation by Kentucky for the year 1901 in this way, to-wit: It took what said board had fixed as the value of all defendant's property or capital stock for the preceding four years, to-wit: Capital for 1897, \$902,070; capital for 1898, \$693,206; capital for 1899, \$663,060; cap-

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ital for 1900, \$663,660—and, adding these four years together, made \$2,921,396, and, dividing that by four, got an average for the four years of \$730,349, and then fixed said \$730,349 as the capitalization of defendant for the year 1901, and, deducting therefrom the assessment of the tangible property in Kentucky, left \$278,349 as the franchise valuation; and, the tax rate being 47½ cents, made defendant's franchise tax for 1901 \$1,322.16. Defendant, denying the correctness or legality of this fixing or valuation of its franchise, and denying the right or power of said board to adopt such a mode or basis of arriving thereat, or its liability for the tax claimed thereon, refused to pay said \$1,322.16; and defendant, further insisting that the correct legal and proper valuation of its said franchise was and would have been for said year 1901 the sum of \$180,489, and the tax it owed to the plaintiff, the Commonwealth of Kentucky, thereon, was \$857.32, and no more, paid in to the auditor of public accounts the said sum of \$857.32, under an agreement that such payment of \$857.32 was in no way to affect the question of defendant's liability for said claimed balance of \$464.84, the question of such liability, and of said assessment or valuation of defendant's franchise, and the method or basis upon which defendant's said franchise should be valued or fixed for taxation by said board, to be determined by the courts. The earnings or receipts of defendant's bridge in Ohio for said year 1901 were \$30,871.55, while in Kentucky they were \$38,300.31. Wherefore the parties presenting the questions herein made pray the judgment of the court thereon, such judgment embracing and giving such relief to the parties hereto, respectively, as they may be entitled to receive. Robt. J. Breckinridge, Atty. General, for plaintiff, the Commonwealth of Ken-

tucky. J. W. Bryan, Attorney for Defendant, the Covington & Cincinnati Bridge Company."

On these facts the following questions were presented to the court for decision: (1) Does the defendant (the bridge company) owe the plaintiff (the Commonwealth) the sum of \$464.84, or any part thereof, on account of a tax of its franchise for the year 1901? (2) What method or basis should be adopted by the State board of valuation and assessment for fixing the value of the defendant's franchise for taxation by the Commonwealth of Kentucky? The circuit court adjudged that the board, in making the assessment, adopted an improper mode, and that the defendant, by the payment to the auditor of the sum of \$857.32, had fully paid to the State the tax on its franchise for the year 1901, and owed no part of the \$464.84 claimed by the State in addition to the amount which had been paid.

The court reached its conclusion by taking the total value of the bridge company's capital stock and bonded indebtedness, \$1,330,00. From this amount it deducted the tangible property assessed for taxation in Ohio, \$237,984, which left a balance of \$1,092,016. As 59 per cent. of the bridge lay in Kentucky, and 41 per cent. in Ohio, it took 59 per cent. of \$1,092,016, which is \$664,289, and from this it deducted the tangible property assessed in Kentucky, \$452,000, which left a balance of \$192,289 as the value of the Kentucky franchise. It is insisted by the State that this is an erroneous method of arriving at the proper valuation of the franchise, for the reason that thus the bridge company is not taxed upon its entire property, and that the Kentucky authorities are not dependent upon the action of the officers of Ohio in fixing the value of the property of the bridge company. It is insisted for the State that the proper way to arrive at the valuation of the franchise is to take the

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total value, \$1,330,000, and get 59 per cent. of it, which is \$782,700, and that this presents the total of the tangible property and of the franchise in Kentucky. Therefore, if we deduct from this total \$782,700, the assessment of the tangible property in Kentucky, \$452,000, the balance, \$330,700, is the value of the franchise. The board fixed the value of the franchise at \$278,349, or considerably less than the result thus obtained.

It is insisted for appellee that the court below followed the case of *Henderson Bridge Co. v. Com.*, 99 Ky., 623 (17 R., 389) (31 S. W., 486, 29 L. R. A., 73), and that this case has been approved in a number of subsequent opinions by this court. But that suit, and all those following it, were actions by the Commonwealth to recover taxes based on the assessment made by the board. The State was not complaining of the assessment; on the contrary, it was endeavoring to enforce it. It had no right of action except upon the assessment, and no question, therefore, could be presented by the State as to the propriety of the assessment which it sought to enforce. The bridge company resisted the assessment, and in response to this the court said at the bottom of page 642, 99 Ky., that the board followed out the line claimed by the defendant. But this action of that board did not prevent another board for any other year from adopting a different line, if the law warranted it. There is nothing, therefore, in any of these cases, determining that the board did not have the right to adopt another basis of assessment.

It is also insisted for appellee that the basis adopted by the board in this case, or the mode by which it reached its results, was erroneous. If this be conceded, still, if the result reached by the board was correct, or not more onerous on appellee than it should have been, the assessment

can not be disturbed; for no principle is better settled than that, if an officer is right in his conclusion, the fact that he gives bad reasons for it, or reached it in the wrong way, is immaterial. If we subtract from the total value of all the property of appellee the value of its tangible property; the balance represents necessarily its tangible property; and, as the Constitution requires all property within the taxing district to bear its equal part of the public burden, this intangible property, so far as it is within the State, must be taxed as other property. While it does not necessarily follow that all parts of a bridge are of equal value, still the fact remains that its whole value is due to its entirety, and that one part of the bridge is practically of no value, at least as a bridge, without the other. *Prima facie*, it should be presumed, where part of a bridge lies in Kentucky and part in another State, that the value of the structure in the two States is in proportion to the length of the bridge in each, for the value of the property depends upon its use as a bridge, and the franchise, it seems to us, must necessarily be apportioned the same way. If it should be shown that the property in the other State was of greater value per foot than the property in Kentucky, our officers are not concluded by the action of the officers of the other State, but could for themselves fix the value of the entire tangible property of the bridge, and deduct this from the total value, which was in this case \$1,330,000. But, there being no showing that there was any discrepancy in value between the Kentucky end of the bridge and the Ohio end, it should be assumed, in the absence of proof, that the value of the property in Kentucky was in proportion to the length of the bridge in Kentucky. We therefore conclude that the basis urged by appellant is the proper one for the assessment of the property under the agreed

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facts, and the board having fixed a lower assessment than this would make, the court erred in not enforcing the collection of the tax on the assessment made by the board; for it is easy to see that if the appellee's property is assessed in Kentucky on the line claimed by it, and also assessed in Ohio on the same line, it will escape payment of taxes on a part of its franchise; for in that event the value of its tangible property will not be subtracted from the total value of its property, but from a per cent. of it, and the balance is necessarily smaller than if the entire value of its property was taken as the basis and the value of its tangible property subtracted from it; and, if the property was so assessed in Kentucky, and not in Ohio, Kentucky would lose a part of her just revenue, although, as to Ohio, there would be no loss.

Judgment reversed, and cause remanded for a judgment in favor of the State for the amount claimed.

Petition for rehearing by appellee overruled.

CASE 42—PROCEEDING BY THE MADISON COUNTY FISCAL COURT TO CONDEMN THE R. & L. TURNPIKE ROAD COMPANY.—DEC. 17.

**Richmond & Lancaster Turnpike Co. v.
Madison County Fiscal Court.**

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APPEAL FROM MADISON CIRCUIT COURT.

FROM A JUDGMENT FIXING THE VALUATION OF THE PROPERTY THE
TURNPIKE COMPANY APPEALS. REVERSED.

EMINENT DOMAIN—TURNPIKE ROADS—CONDEMNATION—JUST COMPEN-
SATION—METHOD OF ASCERTAINING VALUE—JUDGMENT OF CHAN-
CELLOR.

Held: 1. Where the evidence is conflicting the judgment of the chan-
cellor will not be disturbed unless he has proceeded on an im-
proper basis in determining the value of the property in contro-
versy.

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2. In a proceeding under Kentucky Statutes, section 4748b, to condemn a turnpike road, evidence of the fact that the \$20,000 worth of stock of the turnpike company was selling at par, taken in connection with section 242, Kentucky Constitution, providing that just compensation must be made by corporations or individuals taking private property for public use, and the Act of March 17, 1896, providing for the appointment of county commissioners to determine the value of turnpike roads condemned by the county courts, the measure of just compensation to be paid a turnpike company is, its actual value at the time of the condemnation and not what it would cost to construct a turnpike at that time.

J. A. SULLIVAN, FOR APPELLANT.

J. TEVIS COBB, FOR APPELLEE.

(No briefs.)

OPINION OF THE COURT BY JUDGE HOBSON—REVERSING.

This was a proceeding to condemn the Richmond and Lancaster Turnpike Road, under the act of March 17, 1896 (see Kentucky Statutes, section 4748b); and the only question in the case is, what is a fair and just compensation to the owners for the property? In the circuit court, by consent of parties, it was transferred to equity, and heard by the court on both the law and facts as an equity action. The court fixed the value of the property at \$16,000, and gave judgment for this amount, with interest from August 4, 1897, the date when the county took possession of the road, under an agreement that the value of the property and franchises should be determined by law, and that interest should be paid from this date on the amount finally fixed as the value of the property.

It is insisted by appellee that, under the rule established by this court, the evidence being conflicting, the chancellor's judgment can not be disturbed on the facts. There is great force in this contention, if he proceeded upon the proper basis in determining the value of the property; but, if he

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proceeded on the wrong basis, little weight can be attached to his finding; for the reason that, if he had adopted the right basis, he might have reached a very different conclusion. His judgment is in these words: "This cause came on and was heard by the court, and, being sufficiently advised, is of the opinion that the basis of valuation of the property taken in this cause, as it was a dividend paying road, is what it would cost to produce the turnpike road in the condition it was on August 4, 1897; and the court therefore adjudges that the Richmond & Lancaster Turnpike Road Company recover of the Madison county fiscal court the sum of (\$16,000) sixteen thousand dollars, with interest thereon from August 4, 1897, until paid."

By section 242 of the Constitution it is provided: "Municipal and other corporations and individuals invested with the privilege of taking private property for public use shall make just compensation for the property taken, injured or destroyed by them; which compensation shall be paid before such taking, or paid or secured at the election of such corporation or individual before such injury or destruction." Construing the constitutional provision on this subject in *Railroad Co. v. Dickerson*, 56 Ky., 178, 66 Am. Dec., 148, this court said: "The Constitution declares that no man's property shall be taken or applied to public use without just compensation being previously made to him. And according to the construction given to this provision in the cases of *Sutton's Heirs v. City of Louisville*, 5 Dana, 28, and *Rice v. Turnpike Road Co.*, 7 Dana, 81, the compensation secured to the owner is the actual value in money of the property taken from him, which can not be diminished by any speculative advantage he may derive from its appropriation to the public use." Again, on page 178,

56 Ky., 66 Am. Dec., 148, the court said: "The Constitution secures to the owner of the land just compensation for his property before he can be deprived of it. Its value to him, considering its relative position to his other lands, and the other circumstances which may diminish or enhance their value, can alone afford him a just compensation for its loss." In *Robb v. Turnpike Road Co.*, 60 Ky., 117, this decision was approved. In that case the owner offered to prove what the land sought to be condemned was worth to him. The trial court excluded the evidence, and this was held error. The court said that the owner was not authorized to fix a fanciful estimate of the value of the property, and make that the criterion of his recovery, but that the inquiry was, "What would be its value to him, situated as it is, if he were not the owner of it, but owned the adjacent property, under the circumstances as they now exist." Again, in *Asher v. Railroad Co.*, 87 Ky., 391, (10 R., 185) 8 S. W., 854, the court said: "The owners must be placed in the same condition, in a pecuniary point of view, that he would be if the land was not condemned." The precise point raised in this case was not involved in either of these cases, but the principle is the same. When private property is taken for public use, the owner must be placed in as good a situation financially as he was before it was taken. Otherwise, to the extent that this is not done, his property has simply been confiscated for the use of the public. The question, therefore, is not what it would cost to produce the turnpike road in question in the condition it was in on August 4, 1897, but what was the real value of the property as it stood on that date.

The proof for the appellee showed that it had cost \$20,000 to build the pike, but that it was not in as good condition as new, and that a pike like it could now be built for about

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\$1,300 a mile. There were twelve miles of the pike, which, at \$1,300 a mile would amount to \$15,600, and the court seems to have made this evidence the basis of his judgment. On the other hand, it was shown by the appellant that the road, after paying all expenses, and appropriating a considerable sum annually for the keeping up of the property, had paid for a number of years dividends averaging nine per centum annually. During this time the roadbed was improved, from the fact that they used a superior quality of metal to what was used originally. There was no complaint at any time that the road was out of order. The company was never indicted, and the pike was regarded as one of the best in the county. There were a number of other pikes that were feeders to it. The geographical condition of the surrounding country was such that a turnpike could not well be built. The road ran through one of the best sections of Madison county, where land was sold high. The travel on the pike was increasing with the population. The stock for a number of years had sold at par, or more than that, and was in great demand. The charter of the company was granted before the act of 1856 reserving to the Legislature the power to amend laws subsequently passed. The amount of the capital stock in the company was \$20,000. There is some proof that the metal on the pike had worn, and was not as thick as originally; still there is no doubt, from the evidence, that the company could have declared a dividend of six per centum annually out of its earnings, and with the remainder, in a few years, had the metal as thick as was desired; and we are by no means sure, from the proof, that the trouble with this pike was not due to the fact that when the county took charge the company had not made its usual annual repairs,—a thing which in the ordinary course of business was done in the fall,—and after

the county took charge it received no attention for several years, and during that time was used very hard, as it was a free pike. But however, this may be, we are satisfied from the evidence that the property was intrinsically worth \$20,000 on the 4th of August, 1897, for we know of no better way of determining the value of a thing than its actual market price, and this stock had concededly sold for par for a number of years, and was eagerly sought at that price. Beside its roadbed, the company had a right of way thirty feet wide, which was fenced in. It had an established trade. At Silver Creek, a point on the pike, there were two large distilleries. The principal part of the tobacco raised in Madison county was raised in that section, and the road had more travel upon it than any other two pikes in the county. The statute under which the proceeding was had clearly contemplates that all these matters shall be taken into consideration, and that the actual value of the property shall be awarded to the owners. In section 13 it provides: "It shall be the duty of said commissioners to view the road to be taken and require the owner or owners thereof to produce the books or other evidences, the receipts and expenditures on the road or part of the road to be sold, amount of net earnings for said turnpike road company for each year for the past six years, and they shall hear any other evidence conducing to show the value of the property sought to be taken, and shall award to the owner or owners thereof the actual value of the property taken in said county."

There is testimony on behalf of the county to the effect that if all the other pikes had been made free, and this one had remained in the hands of the owners as a tollroad, it would have been much less valuable than formerly. On the contrary, there is testimony for the company that this

would have increased its business, for the reason that there was no other way for the bulk of its trade to get out, and that, if the pikes which fed it were made free, more persons would have traveled it than when they had to pay toll on these pikes. But this matter is, in our judgment, immaterial, for the reason that the county had voted for free pikes; and it was not contemplated that the people of any section of the county should pay taxes to make the other pikes in the county free, and still have to pay toll on the pike they used. It is also immaterial that the county might have built a pike for \$1,300 a mile. It did not propose to build such a pike. It proposed to take appellant's pike, and, when it did so, it must pay appellant the real value of the property at the time of the taking. Any other rule would permit spoliation of private property when taken for public use. The act provides that the proceeding under it shall be the same as under the act for the condemnation of private property by railroads, and precisely the same principle must be adopted here as would be if a railroad company had condemned this turnpike and right of way for a railway. The private property of the citizen is sacred, but private interest must give way to the public good when the thing itself is required for the public use. He must in such case part with his property for the public good, but, under the Constitution, when he does so part with it he must be made whole; and a pecuniary consideration must be paid to him, of such amount that he will be as well off pecuniarily after the taking as he was before. We are therefore of the opinion that the circuit court erred in the basis he adopted for fixing the value of the property, and that, upon the proper basis, its value should be fixed at \$20,000.

Judgment reversed and cause remanded, with directions

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to enter a judgment in favor of appellant for \$20,000 with interest from August 4, 1897.

Whole court sitting except Judge Burnam.

Petition for rehearing by appellee overruled.

CASE 43—ACTION BY ROBERT MCGILL AGAINST L. & N. R. R. COMPANY FOR PERSONAL INJURIES.—DEC. 17.

McGill v. Louisville & Nashville R. R. Co.

APPEAL FROM JEFFERSON CIRCUIT COURT, COMMON PLEAS DIVISION.

JUDGMENT FOR DEFENDANT AND PLAINTIFF APPEALS. REVERSED.

COMPROMISE—FRAUD—PLEADING—TENDER OF PAYMENT.

Held: 1. Where plaintiff sued for personal injuries, admitting that he had received payment for his drug bill and loss of time, and defendant pleaded payment in full under a compromise agreement set forth, a reply that this payment was the same as that admitted in the petition, and that the compromise agreement was signed by plaintiff at a time when he could not read, and under false representations that it was a receipt for payment only for drug bill and loss of time, was not demurrable for failing to tender repayment of the amount received, though plaintiff in such action can not ordinarily escape such agreement by merely pleading fraud.

CHARLES CARROLL AND CARROLL & CARROLL, FOR APPELLANT.
HELM, BRUCE & HELM, FOR APPELLEE.

(No briefs.)

OPINION OF THE COURT BY CHIEF JUSTICE GUFFY—REVERSING.

The appellant instituted this action against the appellee, seeking to recover judgment for injuries received by him while in the employ of the defendant, caused by the gross negligence, as he alleges, of the defendant. A description

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of the injuries received and of the negligence of defendant is sufficiently stated. He prayed judgment for \$10,000. In addition to other averments in the petition, we find the following: "Plaintiff says that for his loss of time between the date of his injury, to-wit, the 2d day of June, 1900, and the — day of October, 1900, he was paid by said defendant the sum of \$200, and defendant paid him the sum of \$10 upon his drug bill; and he says for his loss of time between the 2d day of June, 1900, and the — day of October, 1900, he claims in this action nothing from said defendant. He says for a period of about eighteen weeks, beginning about the — day of October, and up to the — day of March, 1901, he worked for said defendant as a switchman and coupler of cars, but after the 14th day of March, 1901, his condition was such, by reason of the injuries he had received as hereinbefore stated, that he was compelled to quit work for said defendant, and since that time, by reason of said injury, he has been wholly unable to work, and is permanently incapacitated from labor."

The answer may be taken as a complete traverse of any negligence upon the part of defendant, as well as the injuries of plaintiff. It also pleads contributory negligence. In the second paragraph of the answer it is stated, in substance, that defendant believes that plaintiff did receive some slight injuries while working for it on the 2d day of June, 1900, but that the same were received in consequence of the negligence of the plaintiff, and on the 14th day of October, 1900, the plaintiff made claim against the defendant for damages on account of said injuries, and thereupon, in order to compromise, settle, and adjust the matter, defendant paid to McGill the sum of \$210.25 in full compromise and settlement of all claim and demands of every character whatsoever which he had against defendant, its

officers, agents, and employes, on account of the injuries received or sustained by him in person or property on or about June 2, 1900, and that plaintiff, for said sum, executed and delivered to it a full acquittance, discharge, and receipt on account of any loss or damage or injury he may have sustained to person or property on account of said injuries, and that the injuries for which it paid him the sum of \$210.25 are the same as, and none other than, the injuries set forth in his petition; and it files herewith, marked "Exhibit Voucher 7," a copy of the agreement and settlement and receipt, signed by the plaintiff, acknowledging full satisfaction thereof on account of his alleged injuries, the original of which will, if demanded, be produced on the trial of this case; and defendant pleads the same as a complete bar to plaintiff's action herein. The material part of the receipt reads as follows: "1900, October 14. Received of the Louisville & Nashville Railroad Company two hundred and ten dollars and twenty-five cents (\$210.25) in full compromise, settlement, and adjustment of all claims and demands of every character whatsoever which I have against said company, its officers, agents, and employes, on account of injuries to my person and damage to and loss of property sustained by me on or about June 2d, 1900, while employed by said company in Louisville, Ky., and on account of any other injuries sustained by or damage to me at any other time and place on every other account whatsoever. Witness my hand at Louisville this October 15th, 1900. It is understood and agreed that the consideration herein expressed is the sole and the only consideration of this settlement."

The reply of plaintiff denies contributory negligence, and in response to the answer, so far as the receipt aforesaid is pleaded, the reply reads as follows:

"Plaintiff denies that on the 14th day of October, 1900, he made claim against defendant for damages on account of said injuries, or that thereupon or at any time, in order to compromise, settle, or adjust the matter, defendant paid to him the sum of two hundred and ten dollars and twenty-five cents (\$210.25), or any sum, in full or any compromise of all or any claims or demands of any character whatsoever, except as in the petition stated, he had against defendant, its officers, agents, or employes, on account of the injuries received by him in person or property on or about June 2, 1900, while in the employ of defendant; and plaintiff denies that for the sum of two hundred and ten dollars and twenty-five cents (\$210.25), or any sum paid by defendant to him, he then or there, or at any time, executed or delivered, or intended to execute or deliver, to defendant, a full acquittance, discharge, or receipt on account of any loss or damage of injury he may have sustained to person or property on account of the injuries received by him on June 2, 1900, while in defendant's employ, except as in petition and as hereinafter stated; and he denies that the \$210.25 or any part thereof, paid him by defendant, was paid for the injuries set forth and alleged in petition, or for any part of them. Plaintiff denies the right of defendant to plead the alleged receipt, a copy of which is filed with the answer, as a complete bar to his action.

"Par. 2. Plaintiff, for further reply, says that on or about October 14, 1900, he did receive from defendant the sum of \$210.25; but this sum was paid by defendant and received by him in payment of his loss of time up to that date occasioned by said injury, and for part of his drug bill contracted in treating said injury, as in petition stated. Plaintiff says in his petition he stated amount as \$210, but supposes that is a mistake, and now says the amount was

\$210.25. Plaintiff says he received said sum only in payment of his loss of time and drug bill as aforesaid, and it was represented to him by the defendant that said sum was paid for that purpose, and plaintiff did not, in consideration of said \$210.25, or any part of it, agree to release defendant of liability for any personal injury received by him, or for loss of time, except as hereinbefore and in petition stated. Plaintiff says at or about the time mentioned in answer he did sign and deliver to defendant a receipt. He says at said time he was unable to read said receipt, and it was read to him, and represented to him by defendant to be a receipt acknowledging payment of \$200.25 in payment of his loss of time up to that date, and for \$10 of his drug bill, and, so believing, he signed it; and he did not then or at any time intend to sign any paper acknowledging payment in full of his claim against defendant growing out of said injury, or releasing it from all liability by reason of same, and he did not know of the existence of said paper until it was referred to in answer, and he says that if he signed said paper, or one of similar character, his signature was obtained to it in ignorance of its contents, and under the belief that he was signing a paper acknowledging a payment for his loss of time and drug bill, as heretofore stated, and said signature was obtained by the false and fraudulent representations of defendant that said paper was an acknowledgment of the receipt of \$210.25 as payment for his loss of time up to the date of signing, and for part of his drug bill, and for no other purpose, and said paper should not be considered for any other purpose. Wherefore plaintiff prays as in his petition."

The court sustained a demurrer to the reply of plaintiff, and, plaintiff failing to plead further, the petition was dismissed. Hence this appeal.

It is earnestly contended for appellee that the cases of *Railroad Co. v. McElroy*, 100 Ky., 153, 18 R., 730, 37 S. W., 844, and *Society v. Muehl*, 22 Ky. Law Rep., 1378, 59 S. W., 520, conclusively settle that the judgment of the circuit court must be affirmed; while the reverse is the contention of appellant, and it is his contention that the opinion of the supreme court in the case of *Railroad Co. v. Harris*, 158 U. S., 331, 15 Sup. Ct., 843, 39 L. Ed., 1003, and some Massachusetts supreme court decisions, sustain the contention of appellant. The Kentucky cases relied on determine or adjudge that a party who has signed an agreement in a compromise for personal injury can not disregard that settlement and sue on the original cause of action, and, when the settlement is pleaded, simply attempt to escape its binding effect by pleading fraud or misrepresentation in the procurement of the settlement or execution of the paper. In order to escape the effect of the executed agreement, and to be allowed to prosecute his original cause of action, he must restore the money or property received from the defendant, or make a tender thereof. This is the doctrine clearly announced in the cases, *supra*, and we rigidly adhere to that doctrine, without regard to the decisions of other courts; and it may be conceded that they are not all in accord with the decisions of this court. But the question here presented is whether the case at bar comes within the rule of the *McElroy Case* or the *Muehl Case*. Both in the *McElroy Case* and in the one referred to in 22 Ky. Law Rep. it was admitted by the plaintiffs in their reply that they had agreed to accept a certain sum of money in settlement of their entire claim. In other words, the injury claimed by *McElroy* was by him settled and receipted for, and in the other case it was admitted that the plaintiff had accepted a named sum of money in settlement of

her insurance policy; but each of them sought to avoid the effect of the settlement and receipt upon the ground that the same was obtained by fraud, falsehood, or from them while not in a condition to know and understand their right. This court held that they could not be allowed to do so; that, in order to be allowed to prosecute their original cause of action, they must restore to the opposite parties the money they had received, or tender to them the same. This is a just rule. If the original cause of action is to be litigated, the parties must be placed in the position they were before the alleged fraudulent transaction occurred. The case at bar presents a different state of facts from the two cases above referred to. It is true that the paper filed by the defendant purports to be a compromise and full settlement of all claims growing out of the injury to plaintiff mentioned in the petition, as well as other claims he might have against the defendant or any of its agents, servants, etc. His reply admits signing the document, but it also alleges the fact to be that it was only read to him, and that such was the agreement that it only paid him for the loss of time which he suffered as the result of the injury complained of, and the payment of part of the drug bill expended. He also avers he could not read the document, and that he signed it under those circumstances of only settling so much. He can not recover in this case for loss of time between the date of injury and the signing of the receipt,—for the loss of time or drugs bought,—without complying with the principles announced in the two cases heretofore referred to, namely, by restoring the money. But he is not seeking to recover anything for the loss of time, nor for his drug bill. The averments of the reply must, upon demurrer, be taken as true; hence it must be taken as true that he could not

read the receipt, and that the transaction was as he stated it in his reply; and it can hardly be denied that, if his statement is true, the settlement did not necessarily include the mental and physical suffering he had undergone as the result of the injuries complained of, nor would it necessarily and absolutely, if his statements were true, preclude a recovery for a permanent impairment of his ability to labor. If A. held a demand against B. for the price of a house and lot, and also for rent of same antedating the purchase, and if A., in collecting the rent, was induced by false representations of B. to sign a receipt, which also included the purchase price of the house and lot, would it be said that A. must restore the rent money before he could be allowed to prosecute his claim for the purchase money? We think not.

Upon the return of this case, the jury should be told, if it comes to a jury trial, that, if they believe from the evidence that the \$210.25 was paid in settlement of all of plaintiff's demands against the defendant, that they must find for the defendant in this action, although they might believe that the receipt was obtained by misrepresentation or fraud.

Judgment reversed, with directions to overrule the demurrer to the reply, and cause remanded for proceedings consistent with this opinion. Whole court sitting.

Judges Burnam, DuRelle and O'Rear dissenting.

CASE 44—PROCEEDINGS BY THE COMMONWEALTH TO DISBAR CHARLES G. RICHIE AS AN ATTORNEY AT LAW.—DEC. 17.

Commonwealth v. Richie.

APPEAL FROM JEFFERSON CIRCUIT COURT, CHANCERY DIVISION.

JUDGMENT DISMISSING PROCEEDINGS FOR WANT OF JURISDICTION AND COMMONWEALTH APPEALS. REVERSED.

ATTORNEYS—DISBARMENT PROCEEDINGS—JURISDICTION.

Held: 1. Const., section 137, constitutes each county having a certain population a judicial district, with several judges, requires each of the judges to hold a separate court, except when a general term may be held, and provides that criminal causes shall be under the exclusive jurisdiction of some one branch of the court, and all other litigation shall be distributed as equally as may be between the other branches thereof. HELD that, as a proceeding to disbar an attorney is not a criminal case, and so not within the exclusive jurisdiction of the criminal branch, the chancery branch has jurisdiction thereof.

C. J. PRATT, J. M. HUFFAKER AND PIRTLE & TRABUE, FOR APPELLANT.

POINTS AND AUTHORITIES.

1. There are two classes of disbarment proceedings in Kentucky: (a) Proceedings contemplated by section 104 of the Kentucky Statutes, and (b) That class based upon the ancient common law right of the court to protect itself against persons unfit to practice before it. *Wilson v. Popham*, 91 Ky., 330; *Bar Association v. Greenhood*, (Mass.) 46 N. E. R., 574, S. C. 168, Mass., 183; *In re Bowman*, 7 Mo. Ap., 569; *Delano's Case*, 42 Am. Rep., 555; *In re Mills*, 1 Mich., 392; *State v. Harbin*, 29 Mo., 270.

2. The right to disbar is possessed by any court authorized to grant licenses, admitting to the profession. Even an appellate court may have original jurisdiction. *In re Woolley*, 11 Bush, 95; *Baker v. Commonwealth*, 10 Bush, 592; *People v. Green*, 7 Col., 244; *In re Whitehead*, 38 Chan. Div., 614.

3. A formal or technical description of the act complained of, is not requisite, and it is not a criminal proceeding. *Baker v. Commonwealth*, 10 Bush, 592; *Turner v. Commonwealth*, 2

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Met., 629; Rice v. Commonwealth, 18 B. Mon., 482; In re O., 42 N. W. Rep., 221; In re Whitehead, L. R., 38 Chan Div., 614; People v. Green, 7 Col., 237; Bar Association v. Greenhood, (Mass.) 46 N. E. Rep., 574; Flanders v. Keefe, 108 Wis., 441; State v. Clark, 46 Iowa, 168; State v. Cardwell, 16 Mont., 119; In re Treadwell, Cal., 7 Pac., 724; In re Randall, (N. Y.) 52 N. E., 1107; S. C., 158 N. Y., 216; State v. Winton, (Ore.) 5 Pac., 337; In re Evans, Utah 62, Pac., 919; *Ex parte* Wall, 107, U. S., 265; U. S. v. Costen, 38 Fed., 24; In re Wood, 13 Fed., 814; State v. Burr, 28 N. W., 262; In re Serfass, and note, 9 Atlantic, 674; vol 6 Ency. Pleading & Practice, 709; In re Bowman, 7 Mo. Ap., 569; Randall v. Bingham, 7 Wallace, citing with approval; In re Randall, 11 Allen, Mass., 473, 11 Ore., 456; 36 N. Y., 651, 86 Fed., 321.

4. No constitutional requirements effect this proceeding, and loss of moral character is sufficient. 107 U. S., 265; In re Wood, 13 Fed. Rep., 814; 1st Yng. Tenn., 230; 8 Col., 333; 93 Pa. St., 116; 71 Me., 289.

5. Each judge of the Jefferson circuit court has all the powers of a circuit judge (Kentucky Statutes, sec. 1022); having the power to admit to the practice of law, he has also the power to revoke the license of the practicing attorney. Baker v. Commonwealth, 10 Bush, and *supra*.

6. A proceeding to disbar is neither an action nor a special proceeding within the meaning of the code. It is *sui generis*. 7 Mo. Ap., 569.

ADDITIONAL POINTS BY APPELLANT.

1. Counsel for Charles G. Richie makes the point that if this proceeding is not criminal it ought to have been filed in the clerk's office and allotted to one of the civil branches. This position grows out of a misconception of section 1 of the Civil Code which provides as follows: "Civil cases are actions or special proceedings." This is neither an action nor a special proceeding within the meaning of the code. It is *sui generis*. Its sole purpose is to bring to the attention of the court certain alleged acts of professional misconduct committed by an officer of the court in order that the court itself may be informed. The nature of a proceeding to disbar being conceded, this point, it seems to us, falls to the ground.

2. Counsel makes the further point that the relator here is a bar association. This is not a fact. The affidavit upon which the information is based is made by five individuals who state that the facts set out in the affidavit were admitted to them by Richie. The only purpose of the affidavit is to base the informa-

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tion upon it. The rule to show cause issues upon the filing of the information.

KOHN, BAIRD & SPINDLE, FOR APPELLEE.

This is an appeal by the Commonwealth from an order of the Jefferson circuit court, chancery division, refusing to allow affidavits to be filed or to take jurisdiction of this proceeding.

We objected to the filing of the affidavits and to the granting of the rule upon the following grounds:

1. That the proceedings to disbar an attorney for failure to pay over money collected, or a series of such acts, if allowable under the law of this State, is, in its nature and essence a *criminal* proceeding and within the jurisdiction of the criminal branch of said court.

2. That the charges containing the information being all relative to the collection of money by Richie and failing to pay it over until demand was made by attorneys, and then settling the same, are punishable only in this State by virtue of the provisions of section 104 of the Kentucky Statutes and do not authorize a rule for permanent disbarment that the statute is exclusive in cases of this character, and that all of the general allegations of the information and affidavit can be and should be, by a reasonable interpretation, construed to refer to a single series of acts consisting of the collection and non-payment of money, and therefore, do not come within the general category of cases in which the court can protect itself against the dishonesty or misconduct of its officers, the members of the bar.

3. That the information being based upon a failure to account for money, due and received, can not be based upon the information and belief of members of the bar association, who have no knowledge of the facts, but must be based upon an affidavit of the person knowing the facts.

CITATIONS.

Constitution of Ky., sec. 137; Acts 1892, p. 139; Thomas v. State, &c., 58 Ala.; In re Hamilton Ballus, 28 Mich., 507; 1 Hun., 321; State v. Tunstall, 51 Texas, 81; Rice v. Com., 18 Ben Monroe, 482; Turner v. Com., 2 Met., 619; Walker v. Com., 8 Bush; Baker v. Com., 10 Bush, 592; Wilson v. Popham, 91 Ky., 329; Sec. 104, Kentucky Statutes; People, *ex rel.* v. Noyes, &c., 16 Ill., 151; *Ex parte* Brown, 2 Col., 553; *Ex parte* Smith, 28 Ind., 47; In re Eaton, 62 N. W. R., 697; Kane v. Haywood, 66 N. C.; In re Hudson, 36 Pac. Rep., 812; In re Sayre, 36 Pac., 813; People v. Lambron, 1 Scammons (Ill.) 123.

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OPINION OF THE COURT BY JUDGE WHITE—REVERSING.

This proceeding is to revoke the license of appellee, Charles G. Richie, as an attorney, and to disbar him from further practicing such profession. The attorney for the Commonwealth in the Thirtieth judicial district, comprising Jefferson county, filed an information based upon an affidavit, and also the affidavit, in the chancery branch, first division, of the Jefferson circuit court, and asked that a rule issue against appellee to show cause why his license should not be revoked. Objection was made to the order for rule on the ground that that branch of the court was without jurisdiction in the matter, and could make no order therein. Upon this objection being heard, the court refused to award the rule, or to take jurisdiction in the matter at all, and dismissed same for want of jurisdiction. The Commonwealth appeals.

Section 137 of the present Constitution, so far as applicable herein, provides: "Each of the judges in such district shall hold a separate court, except when a general term may be held for the purpose of making rules, or as may be required by law. . . . Criminal causes shall be under the exclusive jurisdiction of some one branch of said court, and all other litigation in said district of which the circuit court may have jurisdiction, shall be distributed as equally as may be between the other branches thereof, in accordance with the rules of the court made in general term, or as may be prescribed by law." It is contended by counsel for appellee that this proceeding is a criminal cause, and that it is within the exclusive jurisdiction of the criminal branch of the Jefferson circuit court. The charge in the affidavit and information is not under the statute for failing to pay over money collected, while that is a

part of the alleged misconduct of appellee, but the charge is under the common law, that appellee, by reason of acts therein charged to have been committed, was no longer such character of person as was entitled to hold the office of attorney at law. If guilty of the charge as stated in the affidavit and information, the punishment prescribed by statute, of suspension for one year, and until the money was paid, would not apply, but the court would be authorized to revoke the license entirely, and to disbar the attorney from practice entirely. The question is, then, presented as to whether the criminal division of the Jefferson circuit court alone has jurisdiction to try a person on proceeding to disbar him from practice. The question as to whether a proceeding of this character is civil or criminal is not one about which the courts have agreed. There is eminent authority to sustain both sides of the question. The direct question has not been decided by this court. In *Baker v. Com.*, 10 Bush, 592, the court said the proceeding is more in the nature of a criminal than civil proceeding. That is as far as we have gone. This is true of contempt proceedings, yet it must be conceded by all that every court has inherent power and jurisdiction to protect itself by punishing contempt shown it. We are of opinion that any branch of the Jefferson circuit court has jurisdiction to try and determine a proceeding to revoke the license of an attorney, just as it has to punish contempt. If the proceeding was a criminal cause, as meant by the constitutional provision, *supra*, the accused could claim a trial by jury, which has never been the rule in this character of case. It seems to be conceded that, if an attorney was to commit some crime,—as to destroy or mutilate a writing used as evidence, in the presence of the court, and in the progress of the trial,—the court would have the right and power to

make an order revoking his license and disbaring him from practicing further in that court, as well as all others. If the court other than the criminal division has power and jurisdiction to disbar at all for any cause, the exclusive jurisdiction would not be in the criminal division. Every court must, of necessity, have the power to protect itself in the administration of justice by preventing dishonest and corrupt persons from appearing as counsel in the trial of cases before it. It would not comport with reason to say that it was ever intended that either branch of the circuit court could grant license, and that then the whole question was turned over to the criminal division as to how long a person could enjoy the benefits and privileges thereby given, and, when any division might be outraged by the misconduct of an attorney, such division or court would be required to go before the criminal division for redress. This court has jurisdiction by statute and the Constitution appellate in its nature only. Supervisory over the subordinate courts, yet we think it would not be questioned that for misconduct in this court, and in our presence at least, we would be without jurisdiction to disbar the offending attorney. An attorney is an officer of the court, created by the court, and is always subject to the rule requiring honesty and good demeanor toward the court in which he practices his profession. When it appears by due process of law in such cases provided that an attorney has forfeited his right to longer be an attorney or officer of the court in the administration of justice by reason of dishonest practices, it is the duty of the court to take from such offender the right to appear as an attorney. Without referring to and quoting from the many conflicting authorities, we have reached the conclusion that the power given to the circuit courts,

regardless of the different branches or divisions, to license persons to practice as attorneys, and thereby to become officers of the court, must also include the power and authority to revoke the license granted upon proper cause being shown. It would necessarily follow that one division of the court, like the circuit court of any county, would have jurisdiction to hear and determine the charges against an attorney practicing before him, regardless of what court in the State granted the license.

For these reasons we conclude the chancery division of the Jefferson circuit court had jurisdiction of this proceeding, and should have awarded the rule to show cause. The judgment dismissing the proceeding for want of jurisdiction is therefore reversed, and cause remanded for further proceedings consistent herewith.

CASE 45—PROSECUTION OF JAMES B. HOWARD CHARGED WITH THE MURDER OF WILLIAM GOEBEL.—DEC. 17.

Howard v. Commonwealth.

APPEAL FROM FRANKLIN CIRCUIT COURT.

DEFENDANT CONVICTED AND APPEALS. REVERSED.

HOMICIDE—TRIAL—EVIDENCE—CONSPIRACY—INSTRUCTIONS—GOOD CHARACTER OF ACCUSED—RES JUDICATA AND STARE DECISIS.

Held: 1. Where, in a prosecution for homicide, a conspiracy is not charged, but the Commonwealth is permitted to introduce evidence that a conspiracy existed, that the accused was a member of it, and that various persons who are claimed to be co-conspirators did acts and made declarations in furtherance thereof, the jury should be told how far and under what circumstances they could consider evidence of the acts and doings of the co-conspirators as evidence against the defendant on trial, and failure to give any instruction limiting the effect of the evidence of conspiracy is error.

114	372
1122	507
114	372
134	528

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- 2 The court is not required to instruct the jury that the law presumes the accused to be of a good character, and that this presumption continues throughout the case, though such instruction may be correct as an abstract proposition.
3. The rule that the law as declared on the first appeal is the controlling principle in the case on the second appeal is recognized, but the principle is sharply limited to points necessary to a determination of the cause. On questions incidental or not considered on the first appeal, the court is not conclusively bound on the second appeal.

GORDON & GORDON, J. A. SCOTT AND J. A. VIOLETT, FOR APPELLANT.

T. C. CAMPBELL, R. B. FRANKLIN, B. G. WILLIAMS AND L. W. ARNETT, FOR THE COMMONWEALTH.

(No briefs in the record.)

OPINION OF THE COURT BY JUDGE DURELLE—REVERSING.

Appellant, James B. Howard, having been jointly indicted with Henry Youtsey, Berry Howard, Harlan Whittaker, and Richard Combs for the murder of William Goebel, was, upon separate trial, found guilty. Upon the former appeal of this case, 110 Ky., 356, 22 R. 1854 (61 S. W., 756), enough was written in the opinion, and in the separate concurring opinions of Chief Justice Paynter and Judges Hobson and White, to give a general idea of the circumstances surrounding the murder, as disclosed by the record, and to show the contentions, on behalf of the Commonwealth and the accused. Upon that trial the contention of the accused was that he had not been in Frankfort for over a year, before the morning of the assassination, except when summoned as a witness in the federal court; that he wished to obtain a pardon from Taylor, who had received a certificate of election as governor, for a crime whereof he stood indicted in the Clay circuit court; that he was notified by one of his friends that the contest over the governorship between Taylor and Goebel would soon be decided, and probably in favor of

Goebel, and therefore, if he desired to apply for a pardon to Taylor, he should do so before the judgment; that immediately thereafter he went to Frankfort for the purpose of making the application, and arrived there about one hour before the shooting. His effort, therefore, was to show that his visit to Frankfort was solely for the purpose of obtaining a pardon, and had nothing to do with the murder of Senator Goebel. The crime of which appellant was accused in Clay county was the murder of George Baker. It is perfectly evident, under the doctrine laid down in the case of *Welsh v. Com.* (110 Ky., 530) (23 R., 151) (60 S. W., 185, 948, 1118, 63 S. W., 984, 64 S. W., 262), that neither the fact that he was indicted for that crime in Clay county, nor the fact that he committed the crime, could have been shown against him in this case, either as a defendant or as a witness in his own behalf. Such facts could not be shown against him as a defendant, because irrelevant. They could not be shown against him to impeach him as a witness, because such a mode of impeachment is forbidden by the statute. On the former trial, as he had the right to do, he waived his right, and, upon direct examination, stated that he was indicted in Clay county for killing George Baker, and came to Frankfort on the 30th of January, 1900, to try to get a pardon. Upon cross-examination he was asked, and compelled to answer, against objection, whether Baker was not an old man, unarmed, with his hands up, begging Howard for God's sake to spare his life. There was other cross-examination, of like character, as to the shooting from a curtained window, of Tom Baker, in the presence of his wife and infant child, and as to whether Howard was guilty of that killing, and had been indicted therefor, which cross-examination was not objected to, but was referred to in the opinion for the guid-

ance of the circuit court upon the second trial. That the cross-examination which was objected to was improper was conceded by all the court, six of the judges concurring in the opinion that it was seriously prejudicial; and the whole court concurred in the reversal of the case on account of the improper statements to the jury by one of the counsel for the Commonwealth. The court's view of the law was thus stated in the concurring opinion of Judge Hobson, which must be regarded as the law of the case: "Judge White and I concur in the opinion of the court in the reversal of the judgment in this case on the ground that the particulars of the shooting of Baker by appellant should not have been admitted in evidence, and that, as the record stands, the statement of the attorney for the State in his closing speech, set out in the opinion, was peculiarly prejudicial. Appellant can not be convicted in this case because he may have committed another crime of like character, and proof that he had done so, or even such an impression, might seriously prejudice him before the jury, who might consider that such proof showed he was the character of person who would commit such a deed as that charged herein." When put on trial for the second time, the accused had the same rights as he had upon his first trial. He might waive them or not, at his election, for he had been granted a new trial. He was not estopped by the course he pursued upon the first trial in objecting or failing to object to the admission of incompetent testimony, nor by his own statement of a fact which could not properly be proved against his objection. Nevertheless, in the opening statement, counsel for the Commonwealth was permitted to state to the jury, against objection, describing the situation upon the day of the murder: "At that time W. S. Taylor had the pardoning power, and at that time James B. Howard,

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the defendant in this case, was under indictment for the murder of George Baker." Counsel further was permitted to state, against objection, that: "He has stated in the presence of a jury, in this courtroom, that he came to get a pardon. Surely the gentleman won't object to that." That this was improper there can be no doubt, under the rulings of the former opinion, where the court said: "

. . And it is a well-established rule that it is error sufficient to reverse a judgment for the court to suffer counsel, against the objection of the defendant, to state facts not in the evidence or pertinent to the issue, and the evidence of which would have been ruled out. 2 Enc. Pl. & Prac. p. 727; Kennedy v. Com., 77 Ky., 340; Howard v. Com., 110 Ky., 356; 22 R., 1854, 61 S. W., 756." Whether it was prejudicial must be determined from the subsequent proceedings in the case.

After Howard's direct examination, in which he detailed the circumstances of his trip, he was asked, on cross-examination, and compelled, against objection, to answer, the question "For what purpose were you going to Frankfort?" He replied: "I came here to get a pardon,—to try to get one. Q. To get a pardon from whom? A. From Governor Taylor. Q. For what?" To this question the court sustained an objection. He was compelled to state, against objection, what was contained in a letter read to him by Bev. White from the latter's brother, viz., that the latter thought Taylor would be ousted in a few days, and if Howard wanted to get a pardon he had better come on and see him before he was ousted, as well as some matters in regard to Mr. Parker assisting Howard in seeing a Laurel county jury about assisting him in obtaining a pardon. The witness Feeny, having on direct examination stated that he had known Howard for some three or four years, was compelled to answer that he first met him in the Rich-

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mond jail. The witness W. F. Phillips, a witness for the accused, was asked on cross-examination if, a short time before Senator Goebel was shot, Jim Howard, Bev. White, and John G. White were not holding secret conferences and caucuses there, and not inviting the witness to be present or permitting him to hear,—so much so that it became unpleasant for him,—and for that reason he sold out his interest and moved to Burning Springs, in that county, to which he answered, “No.” He was then asked if, in a conversation with W. D. Weaver, he had not asked Weaver if he knew they were accusing Jim Howard of having killed Mr. Goebel, and if Weaver did not say, “No; I didn’t know it, but I suspected it, because it was done on the same plan that Tom Baker was killed at Manchester,”—and if witness did not then state that he had been in business with Bev. White, and Bev. White and Jim Howard and others were constantly caucusing at the store, and holding secret conferences to which he was not invited, conducting themselves in such a manner that it became unpleasant for him, and that he dissolved the partnership and moved his stock of goods to Burning Springs. The witness answered that he did not remember it. Afterwards the witness Weaver was permitted to answer, against objection, that the conversation between Phillips and himself did occur as indicated in the question; thus permitting Weaver, when under oath, to detail to the jury a statement by him when not under oath of his suspicion of the accused in connection with another murder, and that the murder of another Baker, committed under peculiarly revolting circumstances, and in a manner similar to that in which the murder of Goebel was committed. This suspicion of Weaver was clearly incompetent, and as clearly unnecessary to the contradiction of the statement of the witness

Phillips. Com. v. Hourigan, 89 Ky., 311 (11 R., 509), 12 S. W., 550; Crittenden v. Com., 82 Ky., 167 (6 R., 20). The procedure complained of here goes a step farther than what was condemned in the two cases cited. There the court condemned an effort to show that the witness who was being cross-examined had stated out of court facts which he failed to prove in court, and thus to transform such hearsay testimony into substantive evidence which did not have the oath of the witness to support it. Here it was not the hearsay statement of a cross examined witness which was transformed into substantive evidence against the defendant, but evidence of what a third party said to the witness. The leading counsel for the Commonwealth, in his address to the jury, referring to the testimony, given on compulsion, that Howard's visit to Frankfort was for the purpose of obtaining a pardon, was permitted to say, against objection: "Why did he leave his home? He tells us that he left for the purpose of getting a pardon, but he declines to tell us for what that pardon was to be. Let us try and reason for ourselves what it was, and I ask you to think what kind of a pardon did he need, that would take him from his home so suddenly? He didn't get the word until this afternoon of Saturday, the 27th, and yet we find him on his way on Sunday morning. What was it? They objected to James Howard telling it, and you are therefore left to guess for yourselves what it could have been. What is it that this man required such hot haste for him to leave and come by London and stop at Winchester, reaching Frankfort on the morning of the 30th? What kind of a crime? It would not be for carrying a pistol. It would not be for disorderly conduct. It would not be for stealing. I don't believe Jim Howard would steal. I give him credit for that. Then it was something, was it not, that

we are not permitted to know, and we are forced to guess? Would you guess it was murder? It must have been a heinous murder that would require this man to leave his home, surrounded by his friends, to come to Frankfort." And again, after an impressive reference to the mountain feuds, and to "waylayings and ambushings day after day, and month after month, and year after year," counsel was also permitted to say: "Goebel was killed as Tom Baker was killed. Clay county invented that method. I am not saying that Jim Howard did that, but Clay county did." And again counsel exclaimed, alluding to the trial of Powers at Georgetown for the same offense: "'Let them prove it! Let them prove it!' was the cry at Georgetown." It is impossible, in reading this record, to escape the conclusion that counsel determined to get around the former opinion of this court, and, by indirection and innuendo, to get before the jury exactly what this court had said should not be directly proven, and that they succeeded in their undertaking. Having got before the jury a statement that the defendant was indicted for the murder of George Baker; that he was seeking a pardon for that offense; that he had been in the Richmond jail; that he was seeking the assistance of a Laurel county jury to obtain his pardon; that he was under suspicion of the murder of Tom Baker, committed under circumstances similar to the murder of Goebel, with which he is here charged,—these matters are argued to the jury as if proven, and doubtless produced the same effect upon the minds of the jury. And if "appellant can not be convicted in this case because he might have committed another crime of like character," and if "proof that he had done so, or even such an impression, might seriously prejudice him before the jury," can we say it was not prejudicial to permit these statements to be made to the jury,

with all the color and fire of the practiced jury orator, doubly impressive because of the sanction of the respected circuit judge, and supported by the incompetent evidence and suggestions which had been adroitly injected into the record? We do not undertake to say that each and every one of these matters would, in and of itself alone, be sufficient to entitle appellant to a reversal; but taken together, in the manner in which they were presented to the jury, they were prejudicial in a high degree.

Certain objections to testimony are urged upon this appeal, which were argued, and must be presumed to have been considered, upon the former appeal; but there are some objections urged which should be considered:

The witness J. B. Matthews was asked if, at a speaking in Somerset before the election, in the fall of 1899, he said, in substance: "Goebel will never be governor. Some one will kill him first." While this might be permissible on cross-examination, it was clearly collateral. It occurred long before the date at which it is claimed any conspiracy was formed, and the Commonwealth should not have been permitted to prove by the witness Epperson that Matthews made the statement. Whether this was prejudicial, however, is doubtful.

The witness Sanderlin, called for the Commonwealth, on his re-examination was permitted to state, against objection, that Robert Webb had a conference with Beverly White in the courtyard, after which Webb told the witness that White would give him \$50 if he would leave. This would seem to be hearsay.

It is also objected that the Commonwealth was permitted to read the legislative journal, showing that in 1900 Republican members of the Legislature voted for the witness Stubblefield for doorkeeper; the evidence being introduced

for the purpose of sustaining Stubblefield's character, which had been attacked. This does not appear to be an authorized mode of establishing the fact sought to be established, but does not seem to be particularly material.

It is objected that Chadwell testified that, in the presence of himself and one Jones, accused said that Goebel "was shot a bad shot, or a deadener; that he saw them taking him off, and he thought he was shot a bad shot." After Howard denied having such a conversation, Jones was introduced in rebuttal, and, against objection, permitted to detail the same conversation. While this testimony of Jones was properly primary testimony, and should have been introduced in chief, some discretion is necessarily allowed the trial court as to such matters, and this hardly amounts to an abuse of such discretion.

There was testimony tending to show that the accused had been recognized running from the Executive building, and at the doorway, with a black, stubby mustache. For the defense, the accused and other witnesses testified that he had been smooth-shaven for a year or more before the killing. The Commonwealth was permitted, in rebuttal, to introduce testimony showing that some months before the murder the accused had possession of a false mustache. This seems to have been perfectly competent rebuttal testimony.

Upon the former appeal it was elaborately argued that, inasmuch as the indictment charged the murder to have been committed by the accused acting jointly with certain named co-defendants and others unknown to the grand jury, and contained no averment of a conspiracy, no testimony should have been permitted, the object of which was to show the existence of a conspiracy, and no testimony as to the acts or declarations of the supposed co-conspirators. It

was perhaps natural, when counsel relied with such confidence upon the absolute incompetency of the testimony objected to, that they should not have presented any instruction as to the effect of such testimony, if considered admissible; and upon the former appeal the question of how far, and under what circumstances, the acts and declarations of co-conspirators were admissible against the accused, was not presented in argument or considered by the court. Upon the second trial, however, an instruction was offered by the accused, and refused, that he could not be convicted upon evidence of what other persons did, but must be convicted, if at all, only upon proof of his own acts and conduct, which must be proved beyond a reasonable doubt; and it is argued here that if, as was the fact, a "great mass of testimony of acts and conversations of persons other than the accused is permitted to go to the jury, and be considered by them on the conspiracy theory, then the jury should have been instructed as to the purpose of such testimony, and how far and under what conditions it could be considered by them against the accused;" that, in the language used in Robertson, Ky. Cr. Law (section 109): "If, after the acts and declarations are admitted in evidence, the testimony to establish the conspiracy is not conclusive, 'the question as to the existence of such conspiracy, at the time of the acts and declarations, should be submitted to the jury under appropriate instructions;' and the question of whether the parties actually did confederate in a common purpose, and whether the acts and declarations offered in evidence were actually done in furtherance of that design, is for the determination of the jury." *Oldham v. Bentley*, 6 B. Mon., 431, is cited in support of this proposition, where it was said: "It is objected that the court improperly refused to tell the jury that the admission of one of the de-

defendants in the absence of the other was not evidence against both. But as there had been previous evidence conducing to prove a combination, the evidence objected to was properly left to the jury, with instruction that, unless they believed from other evidence that the defendants had combined for the purpose of effecting the purpose as alleged, this evidence should have no effect as proof, except against the defendant who made the admission." See, also, *Sodusky v. McGee*, 7 J. J. Marsh., 266, and *Goins v. State*, 46 Ohio St., 457, 21 N. E. 476; the latter case being the only adjudged case in support of the admission of testimony as to the acts and declarations of co-conspirators upon the trial of an indictment where conspiracy is not charged, in which case there is a clear recognition of the principle contended for.

While the instruction which was in fact asked upon this subject was not framed in accordance with the rule in this State, the fact remains that an instruction was asked directly upon this subject, and the court should have given the whole law of the case. And while upon the former appeal the question of an instruction upon this point was not presented or considered, and the only questions considered upon the instructions were as to the propriety of those which were in fact given, we find the doctrine now presented was distinctly recognized in the opinion. Said the court upon the former appeal, considering testimony as to the acts and declarations of others who were either co-defendants or supposed to be co-conspirators: "Of course, the testimony of neither of these witnesses has any bearing upon the guilt or innocence of the defendant, Howard, unless the Commonwealth, by other testimony, establishes a guilty connection between the defendant and Youtsey, and shows to the satisfaction of the jury either that he fired

the fatal shot, or was present and aided and encouraged Youtsey or another to do so." 61 S. W., 759. And again: "And on the trial of one of several defendants jointly indicted for an offense, the declaration of a co-defendant made in the absence of the defendant on trial, in furtherance of the common purposes, is admissible, when a *prima facie* case of conspiracy has been made out. To authorize the admission of such evidence, an express averment in the indictment of the fact of a conspiracy is not necessary. Goins v. State, 46 Ohio St., 457, 21 N. E., 476. 'But to make the declaration competent, it must have been in furtherance of the prosecution of the common object, or constituted a part of the *res gestae* of some act done for that purpose.' 1 Tayl. Ev. p. 542, section 530," 110 Ky., 356, 22 R., 854, 61 S. W., 759. And again: "It seems to us that these declarations of Youtsey come within the rule laid down in these authorities, and are competent evidence to go to the jury. But it must not be forgotten that the defendant's guilt, as principal or accessory, can only be finally established by evidence of his own acts. Wright, Crim. Conspiracies, 69, 71; Steph. Dig. Cr. Law, art. 39," 110 Ky., 356, 22 R., 832, 61 S. W., 759. Under these principles, it follows that, while the particular instruction asked upon this subject should not have been given, the law should have been stated to the jury. If a conspiracy had been alleged in the indictment, it would undoubtedly have been necessary to instruct the jury as to the extent and the circumstances under which evidence of the acts and declarations of co-conspirators were to be received against the accused. Such an instruction is universally required and given in all cases where conspiracy is charged. Where, as in this case, a conspiracy is not charged, but nevertheless the Commonwealth is permitted to introduce evidence that a conspiracy

existed, that the accused was a member of it, and that various persons who are claimed to be co-conspirators did acts and made declarations in furtherance of the purpose of such conspiracy, it follows inevitably that the jury should be told, in effect, how far and under what circumstances they could consider evidence of the acts and doings of the co-conspirators as evidence against the defendant on trial. Some such instructions should have been given as was given in the Powers Case (110 Ky., 386, 22 R., 1837) 61 S. W., 735, 53 L. R. A., 245: "If the jury believe from the evidence, beyond a reasonable doubt, that a conspiracy was formed between the defendant . . . Henry Youtsey, . . . or either or any of them, or with others to the jury unknown, acting in concert with them, or either of them, to kill William Goebel, then, after the formation of said conspiracy, if any, every act and declaration of each of the conspirators, done or said in furtherance of the common design, before the consummation thereof, became the act or declaration of all engaged in the conspiracy." It is therefore not necessary to consider whether this court has power to review its own decision upon a second appeal. The rule that the law as declared on the first appeal is the controlling principle of the case on the second appeal is recognized, whether such rule be regarded as an application of the doctrine of *res judicata* or of *stare decisis*, or simply what is called in Van Fleet on Former Adjudication a rule "of expediency, which is not to be lightly disregarded." There is considerable conflict of authority upon this rule, but as said by Mr. Aiken in the article on "Appeals" in 2 Enc. Pl. & Prac., p. 381: "The principle is sharply limited to decisions on a prior appeal on points necessary to a determination of the cause. On matters not essential,

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or questions incidental or not considered, the court is not conclusively bound on the second appeal." On the former appeal of this case the question was as to the errors complained of. The questions were whether the errors complained of were reversible. It was held that certain of those errors were reversible, and the judgment was reversed. Other matters complained of were held to be error. This question was not presented or considered, but the legal doctrine applicable was considered and announced, and should have been followed by the circuit court.

Considerable argument is devoted to the proposition that the law presumes the accused to be a person of at least ordinary good character; that this presumption continues throughout the case, and is evidence in favor of the accused; and that an instruction should have been given upon this subject. As an abstract proposition of law, there is no doubt of the correctness of the proposition, which is supported by innumerable authorities. Whether it should be given in an instruction to the jury is another question. The only authorities cited upon the proposition that an instruction upon this point must be given are cases in the federal courts (*McKnight v. U. S.*, 38 C. C. A., 115, 97 Fed., 210; *Mullen v. U. S.*, 46 C. C. A., 22, 106 Fed., 894), and a case from Texas (*Stephens v. State*, 20 Tex. App., 255), in which case last named it was held that as counsel for the State improperly discussed the character of the defendant, which was not put in issue, the court should have given the jury a special charge upon the subject of good character, in order to prevent, as far as possible, any prejudice to the defendant by reason thereof. As to the cases in the federal courts, in one of which the case was reversed because of comments by the district attorney similar to those condemned in the Texas case, it must be remembered

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that the federal courts follow the English practice as to charging the jury. The judges comment at length upon the testimony, and advise the jury specifically as to the weight and credit which should be given to particular parts of it. While it might be eminently proper, under that system of charging the jury, to say to them that the accused was presumed to be a person of at least ordinarily good character, and that this presumption continues throughout the trial of the case, such a procedure is unheard of under our system, and its adoption by this court would necessitate the reversal of nearly every Commonwealth case. A contrary procedure seems to be well established, and we do not think the refusal of the trial court to instruct as requested was error.

For the reasons given, the judgment is reversed, and cause remanded, with directions to award appellant a new trial, and for further proceedings consistent herewith.

Judge Guffy concurs in the reversal for the sole reason that the court did not give the instruction indicated in the opinion, but holds that no other error was committed by the court to the prejudice of the appellant. Judges Paynter, White and Hobson dissent.

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CASE 46—PETITION BY THOMAS F. COLEMAN AND OTHERS V. JOHN D. O'LEARY'S EXR. AND OTHERS, TO HAVE CERTAIN CLAUSES OF DECEDENT'S WILL DECLARED VOID.—DEC. 17.

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APPEAL FROM JEFFERSON CIRCUIT COURT, LAW AND EQUITY DIVISION.

FROM THE DECREE RENDERED PLAINTIFFS APPEAL. REVERSED.

WILLS—TRUSTS—CONSTRUCTION—CHARITABLE USES—PERPETUITIES—
BEQUEST FOR MASSES—BEQUEST FOR SCHOOL CHILDREN—FOR
POOR PEOPLE—TRUSTEE—SELECTION OF CO-TRUSTEE—UNASCE-
RTAINABLE OBJECT—BENEFICIARIES—OBJECT OF TRUST—LOCATION—
ENFORCEMENT—RIGHTS OF HEIRS—APPEAL.

- Held: 1. The validity of a will is to be determined under the statute in force at the time of the testator's death.
2. A bequest in trust for masses for the repose of testator's soul was valid, being enforceable on application by the heirs, and was not void as a private trust, contravening the doctrine of perpetuities.
 3. A bequest of a certain sum, "to be invested, and the income of which to be applied in rewards of merit to pupils in the parochial poor schools in L." was certain and valid.
 4. To a bill praying that a will be adjudged void, a defendant who was a beneficiary under a certain clause demurred, and another, who was beneficiary under another clause, answered. A demurrer to the answer was carried back to the petition, and it was dismissed absolutely. HELD that, though the court did not rule on the defendant's demurrer, it having held all the clauses valid, and dismissed as to all, the court on appeal would consider the case of the demurring defendant.
 5. A bequest to one, "to be applied to any charitable uses, and so as to do most good, in his judgment," is invalid.
 6. A bequest to the Jesuit order "for the purposes of education or religion" was invalid, as not to "an identified or ascertainable object."
 7. A bequest in trust to a certain person, "and three others to be chosen by him," was not objectionable for the power given to the trustee named to select his colleagues.
 8. Under Const., 1799, art. 6, section 8, adopting the general laws of Virginia, which included English statutes made in aid of the

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common law prior to 4 Jac. I., "which are of a general nature, not local to that kingdom," the adoption thereby of St. 43, Eliz. c. 4, relating to charitable trusts, included more than the preamble thereof, and conferred on the courts a corrective and remedial power in the administration of such trusts; such power having been directly exercised by the English courts after the enactment of the statute, without the intervention of the commissioners provided by it.

- Act 1852 (1 Rev. St., p. 235), permitting bequests in trust "for the relief or benefit of aged or impotent and poor people," which succeeded 43 Eliz., c. 4, adopted by the State, in which the words were, "for relief of aged, impotent and poor people," did not change the meaning, and does not require that the "poor" who may be beneficiaries of such trust must be old or impotent, but those who need assistance; and a bequest for founding a home for "poor" men was not uncertain.
10. A bequest in trust for the establishment of a home for poor men was not uncertain because no one was given power to select the objects of the charity, as the trustees would have authority to act in the management under the direction of the chancellor.
 11. A residuary bequest in trust to the "Bishop of the Catholic Diocese of Louisville, . . . for the establishment of a home for poor Catholic men," was not void for being indefinite as to the location in which the home should be established, and from which the beneficiaries should be selected, as, under 1 Rev. St., p. 236, section 2, providing that equity may uphold a charitable trust by taking control of the fund, and directing its management, and settling who is the beneficiary thereof, the will would be construed as requiring the establishment of the home in Louisville, and the selection of beneficiaries from that diocese.
 12. To the extent that testator's heirs knowingly permitted the executors and trustees under void clauses of his will, attempting to create charitable trusts, to proceed with the execution of the will as if valid, and to expend the fund for the benefit of the supposed objects of charity, no recovery can be had by them; nor, if investments have been made in execution of the supposed purposes of the void clauses, can recovery be had for the loss, if any, occasioned by such re-investment.

D. W. SANDERS AND J. W. S. CLEMENTS, ATTORNEYS FOR APPELLANTS.

1. It is a well recognized principle of equity that no trust shall fail for the want of a trustee, so that when this provision was placed in our statute of charities it was only declaring the

law as already settled. It is an equally well settled principle that there can be no trust at all without a *cestui que trust*, or beneficiary. Without this element there is no trust for a trustee to uphold. The indispensable elements of a trust are, (1), the declaration or creation of the trust by the donor, (2), a fund or property to pass and (3), a beneficiary or *cestui*. The trustee is a secondary matter; he can always be supplied. The beneficiary must either be pointed out with such certainty that his identity may be judicially determined, or the creative language of the trust must indicate some condition or circumstance from which a court may arrive at certainty. *Id est certum quod redi potest certum*. Now, upon this general law of private trusts has been superimposed charitable trusts and public or merely humane trusts. The difference between a private trust and a charitable trust is simply this: In a private trust the individuals are named or so designated that they can be judicially ascertained as individuals; in other words individual personality characterizes the beneficiaries, while in the charitable trust personality is ignored and the misfortune or condition provided for is the prevailing idea, whenever it may be manifest in any individual who comes within the class designated by the donor in a general way. In the latter the idea is civic and impersonal. A devise to any number of designated poor orphans in trust is merely a private trust and is void as a perpetuity, unless limited within the statutory period. A devise in support of one's destitute descendants and their children is not a charity and is void as a perpetuity. *Kent v. Dunham*, 142 Mass., 216. There is great confusion in the decisions as to the extent of lax construction that courts should adopt in upholding vague charitable devises. Sentimentality has too often taken the place of logic and law in the decisions of these questions. The question is not whether our courts will uphold indefinite charitable devises, for all charity devises are necessarily indefinite, but whether or not there is a limit in vagueness, beyond which our courts will refuse to go.

2. The devise must name an object—as a church, orphan asylum, school or the poor of a certain municipality, or it must name a class of objects generally with power to some one to select the particular object or objects from a designated class as to the schools of a State or nation of a certain kind, or to the charitable institutions of a State or municipality or diocese or church organization, with power to trustee to select the particular institution or institutions, etc. The reason for this is very clear.

There must be that reasonable certainty necessary to enable a court judicially to enforce the charity. In other words some reasonable ascertainable beneficiary that can come into a court as plaintiff and ask for and have enforced the charity. There can be no trust without some sort of reasonably ascertainable *cestui que trust*. If the gift be to the poor of some municipality, either it or some poor person resident could ask the court to enforce the trust, but when no place, State, nation or town is named then this is no longer possible, for if a Kentuckian asked the enforcement of the devise, a Hindoo or Chinese could appear and make equally as good a claim, hence such a vagueness renders the devise void for the court could not know from the will what locality was to be the home of the beneficiaries. Even Perry in his essay in favor of the English-Massachusetts idea admits that such is the American rule, but he does so grudgingly. See recent edition, section 713.

3. We beg the court to notice the material difference between the statute of Elizabeth and our own. In that statute the language is "for relief of aged, impotent and poor people;" while in our statute, the language is "for the relief or benefit of aged, or impotent and poor people." Now, the devise in question names a home "for poor Catholic men," and while it might have been upheld under the language of the old statute it plainly can not be under ours. Our law makers very wisely determined to provide that the rich, though old or impotent, were not objects of charity, and especially, too, that the poor, unless they were also either old or impotent could not be objects of charity. The material difference renders the *cy pres* authorities relied on entirely worthless.

4. The court below in his thick and thin defense of *cy pres* overlooks the obvious distinction between a gift to the organized charities of a church to an organized asylum, college, school or to a State, county, city or town for public or charitable purposes. In all such cases the direct and legal object of the charity, the party who could come into court and have it enforced, is the organized body itself. In all such cases, as has been often decided, the donor is conclusively presumed to have given in harmony with the purposes of the organization, so that the individuals who are taught in the churches or schools or by the missionaries, or the orphans succored are the beneficiaries only in a remote and secondary sense; but where as in case at bar a new and perpetual trust is made to establish a home for poor Catholic men, with neither home nor beneficiaries in any way designated or located, there is neither an organization, society or any individual who can come into court

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and enforce the trust at all, and, hence, it is void. This is the excess of vagueness that the law will not allow, except where *cy pres* rules prevail. This distinction is too obvious to need argument.

5. In devise at bar the trustees are certain, but they are given no power at all, and no located or limited class is named from which selection could be made. This defect is absolutely fatal. The court says, further disposing of the authorities urged by counsel for appellees and court below: "If a devise is made to an association, voluntary or corporate, having its board of trustees, and organized for a known and legal purpose, such as a church or a theological institute, the law will presume that the testator intended that the trustees or regents of such association should administer the charity in furtherance of the purpose of such association, and when necessary, select the beneficiaries." See *Bridges v. Pleasants*, 4 Ired. Eq., 26. This obvious distinction disposes of every case cited by appellee's counsel in support of the devise at bar.

If it be possible that the trustees may misuse the fund and still, owing to vagueness, the court is unable to correct the abuse, then the devise is void, irrespective of what is or may be done. The law can not recognize a form of property that can not be controlled. It is otherwise where courts follow the *cy pres* rule, for there they can act paternally and devote the fund outright *cy pres*, and so there can be no abuse. In this State where no *cy pres* rule exists, such devises must fail.

6. We do not claim that the saying of mass for any one is an illegal thing, on the contrary it is perfectly legal, but whenever a trust is attempted to be made the usual rules must be applied. There can be no trust, of course, without a living beneficiary or the possibility of one coming into being. This can never be so of the dead and there being no trust effectual the property is undevised.

These devises are trusts or nothing. They are not charitable, first, because they name the specific disembodied souls, and, second, they name the testator's own soul, and by all authority these are not charities, neither by statute or court finding, for it is of the very essence of a charity that no specific individual is pointed out.

A dead person or persons can not be the *cestui que trust*, and, hence, the attempted trust is void. A trust will never fail for want of a trustee, but there can be no trust without a *cestui que trust*.

7. Finally, we insist we have shown from reason and authority that the residuary devise is void (1) because it does not

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name a charitable object under our statute, which require that the poor shall also be "aged or impotent," contrary to that of Elizabeth; (2) because no power is given to any one to select the object of the so-called charity, a thing that is always fatal to such trusts; (3) because it fails to locate the home at any place or give any place from which the beneficiaries are to be selected; and (4) because it fails to empower any one to make such location or selection; that the mass clauses are void because they are not charity trusts at all, being mere private trusts void for want of a living *cestui que trust*; that devise to the bishop of Cork is void because no object or class of objects is named according to the rule in the Spalding case, and that the Jesuit devise is void, because, as held in the Tilden case, no preference is expressed for alternate objects named, and even the classes referred to are too vague for judicial enforcement. For these reasons a reversal is respectfully asked.

AUTHORITIES CITED ON INDEFINITE DEVISES.

Grimes v. Harmon, 35 Ind., 198; Fifield v. Van Wyck, 94 Va., 557; Spalding v. St. J., Ind., S., 21 R., 1107; Cromie v. L. O. H. Society, 3 Bush, 374; Moore v. Moore, 4 Dana, 354; Johnson v. Johnson, 92 Tenn., 559; Rhodes v. Rhodes, 88 Tenn., 637; Bridges v. Pleasants, 4 Ired. (N. C.), 26; Gallego v. A. G., 3 Leigh (Va.), 450; Janey v. Latane, 4 Leigh (Va.), 327; Carter v. Wolf, 13 Gratt. (Va.), 301; Tilden v. Green, 130 N. Y., 29; Read v. Williams, 125 N. Y., 560; Beckman v. Bonsor, 23 N. Y., 298; Prichard v. Thompson, 95 N. Y., 380; Kent v. Dunham, 142 Mass., 216; Dublin Case, 38 N. H., 459; Kelly v. Nichols, 21 At. R., 840; Yungling v. Miller (Md.), 26 At. R., 491; Dulaney v. Middleton (Md.), 19 At. R., 146; Hoffman Will (Wis.), 36 N. W., 407; Moore v. Carpenter, 19 Vt., 613; Dashiell v. Attorney-General, 5 Har. & John., 392; Lepage v. McNamara, 5 Iowa, 124; Garrison v. Little, 75 Ill. App., 75 Hun., 298; 66 N. W. R., 955 Mich.; 147 N. Y., 104; 92 Hun., 96; 27 S. E. R., 446 (W. Va.), and 389; 154 N. Y., 199; 73 N. W. R., 617 (Iowa); 46 N. Y. S., 1035; McHugh v. McCole, 12 N. W. R., 631 (Wis.); 72 N. W., 631 (Wis.); 19 N. J. Eq., 453; 5 Cranch, C. C., 632; 53 N. W. R., (Minn.), 648; Brennan v. Winkler (S. C.), 16 S. E. R., 190; Gambell v. Tripp, A. R. L.; 19 N. Y. S., 840; 19 N. S. R., 801; 26 N. E. R., 426; 26 N. E. R., 730; 44 N. W. R., 304; 7 N. Y. S., 861; Bristol v. Same, 53 Conn., 242; 64 Md., 333; 31 Minn., 173; 56 Md., 362; Kain v. Gibbony, 101 U. S.; A. G. v. Soule, 28 Mich., 153; 2 Md., 557; 31 Conn., 407; 24 Conn., 350; 22 Conn., 31, 54 and 55; 30 Conn., 113; 4 C. E. Green (N. J.), 255; 40 Wis., 29; Wheeler

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v. Smith, 9 How., 55; 3 Fed. Cas., 783; 17 How. (U. S.), 368; Masses: *Festorazzi v. St. Jos. Cath. Ch., &c.*, 104 Ala., 327; *Holland v. Alcock*, 16 N. E., 305 (N. Y.); *Swartz Will*, N. Y. S., 134; *McHugh v. McCole*, supra; *Morrow v. McConville*, L. R., Irish XI., 236; *Dorrian v. Gilmore*, L. R. Sr. XV., 69, and *Dillon v. Reilly*, I. R., 10 Eq., 152; *Blundell's Will*, 30 Beavan, 360; *Attorney-General v. Dulaney*, Irish, 10 Com. Law, 104. School Devise: *Goodell v. Un. Ass. &c.*, 29 N. J. Eq., 32; Ky. Stat., Morehead & Brown, Stat. vol. 1, 308. As to one representing class: 17 B. M., 499; 4 Bush, 215; 8 B. M., 70, and 1 Bush, 307; Civil Code, sec. 25.

P. B. & UPTON W. MUIR, FOR APPELLEES.

CLASSIFICATION REQUIRED BY RULE 17.

1. What act in force. The present statute of charitable uses and trusts was not in force at the death of testator, O'Leary. Therefore, the act found in the General Statutes, page 242, must govern. *Crawford v. Thomas*, 21 Ky. Law Rep., 1100.

2. Effect of demurrers. The validity of the contested bequests was properly decided on the demurrers by appellant to defendants' answers, as by a rule of pleading, universally recognized, said demurrers were carried back to the plaintiffs' petition, and sustained as to it. All works on pleadings so teach.

3. Masses. The bequests for masses are valid public charitable bequests. The mass defined and sustained by overwhelming authority. *Gass & Bonta v. Wilhite*, 2 Dana, 182; *Siebert's Appeal* (Penn.), 6 Atl. Rep., 105; *Rhymer's Appeal*, 93 Penn., 142; *Jas. Schouler*, petitioner, 134 Mass., 426; *Seda, et al. v. Huble*, 75 Iowa, 429; *Moran v. Moran*, 104 Iowa, 216; *Harrison v. Brophy* (Kansas), 40 L. R. A., 721; *Hoefler v. Clogon*, 171 Ill., 452, and cases cited by the court; *Kerrigan v. Tabb* and others (New Jersey), 39 Atl. Rep., 701; *Sherman v. Baker* (R. I.), 40 L. R. A., 718; *Kimball Webster*, executor of *Jas. Ryan v. Sughrow*, etc. (N. Ham.), 48 L. R. A., 100; *Elmsley v. Madden*, 18 Grant's Chy. Rep., Ontario, 386; *Atty. Gen. v. Hall*, Ireland, decided in 1897; (Cited in the Illinois case.)

Contra. The cases of *Festorazzi v. St. Joseph's Catholic Church*, 104 Ala., 327, and *McHugh v. McCole*, Wisconsin, examined. The former (the chief justice dissenting) shown to be based on a misapprehension, and the latter to be based entirely upon a local statute. But even that case was disapproved and practically overruled by the same court in a very able opinion rendered in 1900 in the case of *Harrington v. Pier*, 50 L. R. A., 318-319. I hope the court will find time to read the opinion. It sustains devises for masses, and indeed, so far as

our clients are interested, every contested devise in this case. It is true the chief justice dissented, but not on that point. The Festicorazzi case is then the only one against the validity of masses in the United States. And it was based upon two fatal mistakes, as shown in the brief.

4. Bequest for "rewards of merit," etc., 11th clause: "I give and bequeath to the Rt. Rev. Roman Catholic Bishop (for the time being) of Louisville the sum of \$3,000, to be invested, and the income of which to be applied in rewards of merit for the pupils in the parochial poor schools of Louisville."

We have found no authority against this bequest, and can conceive of no reason which can be urged against its validity. We therefore only cite in support of it the will of Dr. Franklin, and the cases *Almy v. Jones*, 17 R. I., 270, and *Palmer v. Union Bank*, 17 R. I., 630. That it is a valid public charitable bequest there can be no doubt.

5. Residuary clause, 20th clause: "All the remainder of my estate after the payment of the specified legacies and bequests I wish to be invested and placed in trust with the Rt. Rev. Bishop of the Catholic Diocese of Louisville and three others to be chosen by him for the establishment of a home for poor Catholic men, as soon as the proceeds of my estate may justify it."

(a) The power conferred upon the Bishop to appoint three associates valid. *Dudley v. Weinhart*, 93 Ky., 403; *Crawford v. Thomas*, 21 Ky. Law Rep., 1100; *Lillard v. Robinson*, 3 Litt., 415; *Herbert v. Herbert*, *Wright, etc.*, 85 Ky., 134; *Miller v. Teachout*, 24 Ohio St., 535; *Hertz v. Abraham* (Ga.), 50 L. R. A., 361.

(b) This is a public charitable bequest, and is valid, both at the common law and by our statute. *General Statutes, Charitable Uses*, 242; *Prof. Ames*, 5 *Harvard Law Review*, 390; *Snug Harbor Case*, 3 *Peters*, 99; *Russell v. Allen*, 107 U. S., 163; *Chambers v. St. Louis*, 29 Mo.; *Dye v. Beaver Creek Church* (S. C.), 26 S. E. Rep., 717; *Perry on Trusts*, sec. 687, etc.; *Harrington v. Pier* (Wisconsin, 1900), 50 L. R. A., 307; *Moggridge v. Thackwell*, 7 *Vesey*, 86; *Porter's Case*, 1 *Coke*, 17; *Judge Story* in *Appendix to 3 Peters*, 499; *Vidal v. Girard's Executors*, 1 *How.*, 183; *Gass & Bonta v. Wilhite*, 2 *Dana*, 170; *Moore's Heirs v. Moore's Devisees*, 4 *Dana*, 366; *Curling's Heirs v. Curling's Administrator*, 8 *Dana*, 38; *Chambers v. Baptist Educational Society*, 1 *B. M.*, 214; *Attorney General v. Wallace*, 7 *B. M.*, 617; *Cromie's Heirs v. Louisville Orphan Home*, 3 *Bush*, 365; *Peynado v. Peynado*, 82 Ky., 13; *Leed's v. Shaw's Admr.*, 82 Ky., 79; *Kinney v. Kinney*, 86 Ky., 610; *Pen-*

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ick, Rector, v. Thom's Trustee, 90 Ky., 668; Ford v. Ford, 91 Ky., 572; Given's Admr. v. Shouse, 5 Ky. Law Rep., 419; Tichenor v. Brewer, 17 Ky. Law Rep., 936; Bedford v. Bedford, 18 Ky. Law Rep., 195; Crawford v. Thomas, 21 Ky. Law Rep., 1100; Spalding's Heirs v. St. Joseph's Industrial School, 21 Ky. Law Rep., 1107. This last case is cited only to show that it is entirely consistent with all the foregoing bequests.

6. Charity generally, 12th clause: "I give and bequeath to the Rt. Rev. Roman Catholic Bishop (for the time being) of Cork, Ireland, the sum of \$3,000, to be applied to any charitable uses and so as to do most good, in his judgment."

This is a valid bequest, sustained by all the Kentucky cases (except the Spaulding case), including the case of Crawford v. Thomas. All the authorities cited under other heads, also Erskine v. Whitehead, 84 Ind., 358.

7. Visitorial rights. Heirs will not be heard unless there has been "some abuse of the trust or some failure to execute it." Atty Gen. v. Wallace, 7 Ben. Mon., 621. No such abuse or failure has been alleged, or could have been truthfully alleged. The trust was executed before this suit was filed.

8. The prerogative and *cy pres* doctrines. There is no reason whatever for invoking or discussing either of these doctrines in this case. Neither of them has been invoked by us, for there is nothing in this case to call for the discussion or application of either. We have no need of them, nor any use for them, or for any English or American case influenced by either of them. All this is fully shown in the brief. All that has been said on this subject is therefore wholly irrelevant. I will not, however, complain of Brother Clements for calling every case against him a "*cy pres*" and every law-writer who states the law against him another "*cy pres*," provided he will solemnly promise never to be so angry with me as to call me a "*cy pres*."

As this "*cy pres*" doctrine is treated by Chief Justice Woods and to the extent that it is purely "judicial," it is not objectionable. He excludes prerogative from it and leaves it simply and "in effect a liberal rule of construction." Erskine v. Whitehead, 84 Ind., 358; 2 Perry on Trusts, sec. 727.

C. B. SEYMOUR AND C. C. MATTINGLY, ATTORNEYS FOR JAS. M. HAYES, AN APPELLER.

SYNOPSIS.

1. A defendant can not be compelled against his will to become a plaintiff and to sue himself and others. Code, section 25.

2. A bequest to a priest for masses to be said is a valid charity. Cases cited in note to *Moran v. Moran*, 4 Am. and Eng. Dec. in Equity, p. 41.

SAM J. BOLDRICK, WARNING ORDER ATTORNEY FOR THE SOCIETY OF JESUS AND BISHOP OF CORK.

The importance, always recognized, of protecting the individual rights of every person to devote his private fortune to the public good so far as practicable without the violation of any legal principle, and of making all efforts to that end effective to accomplish the donor's purpose, can not be overestimated. Few things occur in the administration of justice more lamentable than the occasional strangling of some wise and noble purpose to devote the savings, or part of them, of a life of industry, to the upbuilding of the human race at some point or in some field and the diversion of what was intended for some public benefit to private use, directly contrary to the will of him whose last days were solaced with the thought that his public benefactions would build an enduring monument to his memory in the hearts of grateful people, and the hope of eternal reward for such well doing, believed to be waiting for bestowal. That idea prevailed when the fathers of the common law so far back that neither the memory of man nor judicial records run to the contrary. It became crystallized as part of the common law of England long prior to the statute of 43 Elizabeth, chapter 4, to the effect that gifts to charitable uses should be highly favored and construed by the most liberal judicial rules that the nature of each case as presented would admit of, rather than that the gift should fail and the intent of the donor fail of accomplishment.

If it should be contended, which it is not, because the question is settled in *Atty. Gen. v. Wallace*, 7 B. Mon., that the trustee, of the Society of Jesus, is incapable of taking, it would not make the devise void, but the court would simply appoint a trustee, the doctrine applying that a trust for charity never fails for want of a valid or competent trustee; but this question is not raised.

I was appointed warning order attorney also for the bishop of Cork, Ireland, one of the devisees, but as the executor has long since paid him, the plaintiff will have to go to Ireland to sue.

But as far as the Society of Jesus and the bishop of Cork are concerned, their case is not before the court, because the warning order attorney filed demurrers for each to the petition, and while the court declared these devises good, the

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judgment neither overrules nor sustains either one of these demurrers, but only carries back the demurrers of plaintiff to the petition of those who filed answers, (viz., Hayes and Judge Muir's clients), leaving the demurrers of the society and the bishop, undisposed of. Undoubtedly, the plaintiff does not care to push these devises, but is interested mainly in the bulk of the estate which goes to Bishop McCloskey, trustee; therefore, all this court can do is to dismiss the appeal as to the Society of Jesus and the bishop of Cork, because it has never been perfected.

AUTHORITIES CITED.

Constitution of Ky., 1799, art. 6, sec. 8; Morehead and Brown Statutes, vol. 1, p. 612; Morehead and Brown Statutes, vol. 1, p. 308; General Statutes, 242; Pomeroy's Eq. Juris., vol. 2, sec. 1028, note 3; Moore v. Moore, 4 Dana, 359; Spalding v. St. Jos. Ind. School, 2 Ky. Law Rep., 1107; Bispham Equity, p. 168; Pomeroy Equity, vol. 2, secs. 1023-1021; Bouvier Law Dictionary, for "or" and "and;" Lichfield v. Cudworth, 15 Bick., 27; U. S. v. Fisk, 3 Wall., 447; Dumont v. U. S., 98 U. S., 143; John v. Smith, 102 Fed. Rep., 218; Erskine v. Whitehead, 84 Ind., 359; Phillips v. Harrows, 93 Iowa, 92; Harrington v. Pier, 105 Wis., 485; In re Upham's Estate, 59 Pac. Rep., 315; In re Upham's Estate, 46 Ga., 88; In re Upham's Estate, 83 Ala., 299; In re Upham's Estate, 39 La., 1043; Kinney v. Kinney, 86 Ky., 610; Atty. Gen. v. Wallace, 7 B. Mon., 617.

OPINION OF THE COURT BY JUDGE DURELLE—REVERSING.

This appeal is to determine the validity of six clauses of the last will and testament of John D. O'Leary, a respected citizen and resident of Jefferson county. The will was a holograph. Certain of its provisions were held by the county judge to have been canceled and revoked. With the exception of the canceled clauses, it was admitted to probate. Appellant Thomas F. Coleman, suing for himself and for the heirs at law of John D. O'Leary, as a class, filed his bill, praying that the will be adjudged void as a whole; that the devises contained in each of the six clauses mentioned be declared void; that the estate be adjudged to be undevised estate, which descends to the heirs at law; and

for a settlement and distribution of the estate. As alternative relief, the bill prayed, in the event any or all the trusts provided in the disputed clauses should be held valid, that the trustees be required to carry out the same. An answer was filed, and a demurrer to the answer was carried back to the petition and sustained. The question before us, therefore, is as to the sufficiency of the petition attacking the validity of the contested clauses. These clauses are as follows:

"Clause 4. I give and bequeath to the Rt. Rev James M. Hayes, S. J., Chicago, Ill., the sum of \$3,000 for masses for the repose of the souls of my mother and my aunts, Ann and Ellen, and my own."

"Clause 11. I give and bequeath to the Rt. Rev. Roman Catholic Bishop (for the time being) of Louisville the sum of \$3,000, to be invested, and the income of which to be applied in rewards of merits to pupils in the parochial poor schools in Louisville.

"Clause 12. I give and bequeath to the Rt. Rev. Roman Catholic Bishop (for the time being) of Cork, Ireland, the sum of \$3,000, to be applied to any charitable uses, and so as to do most good, in his judgment.

"Clause 13. I direct my executor to expend the sum of \$1,000 for masses for the repose of my soul and those of my mother and aunts, to be said at the cathedral, Louisville."

"Clause 20. All the remainder of my estate, after the payment of the specified legacies and bequests, I wish to be invested and placed in trust with the Rt. Rev. Bishop of the Catholic Diocese of Louisville, and three others to be chosen by him, for the establishment of a home for poor Catholic men, as soon as the proceeds of my estate may justify it."

"Clause 22. I give and bequeath to the Order of the Society of Jesus, known as the 'Jesuit Order,' one hundred acres of land, at or near my place, Doneraile, in Jefferson and Bullitt counties, for the purpose of education or religion; they to have the privilege of selection on any lands on the west side of the Louisville & Nashville Railroad right of way."

The questions, therefore, to be determined by this court, involve simply the validity of these clauses. These questions are to be determined, not under the present statute, which, as amended, was approved May 12, 1893, and became a law October 10, 1893 (Kentucky Statutes, section 317 *et seq.*), but, as the testator died on May 14, 1893, must be determined by the statute in force at that time (General Statutes, p. 242, which is a re-enactment of 1 Revised Statutes, c. 14, p. 235). *Crawford's Heirs v. Thomas* (21 R., 1100) 54 S. W., 197.

We shall first consider the clauses directing expenditures for masses for the repose of the souls of the testator and certain named relatives, being clauses 4 and 13 of the will. These clauses undoubtedly express, definitely and distinctly, the intention of the testator. Indeed, the very certainty of the beneficiaries under these clauses is made the ground of attack, for there is no suggestion in this court either that they are void because of being indefinite, or as being bequests for superstitious uses; but the ground urged is that, being gifts to named persons for the benefit of the souls of the testator and of designated persons, these devises are not charities at all, but private trusts, and therefore void, as contravening the doctrine of perpetuities. The trustee in the fourth clause, who is also one of the heirs at law of testator, has filed an answer, stating want of knowledge as to whether any of the devises in the will is void for uncer-

tainty or any other reason, but averring that, if any of the devises shall be held void, he is willing that the amounts received by him be credited on his interest in decedent's estate. The attack upon these mass clauses is based especially upon the case of *Festorazzi v. St. Joseph's Church*, 104 Ala., 327, 18 South, 394, 53 Am. St. Rep., 48, citing, also, *Holland v. Alcock* (N. Y.) 16 N. E., 305, 2 Am. St. Rep., 420; *In re Schwartz's will* (Sur.), 3 N. Y. Supp., 134; *In re McEvoy's Estate*, Id., 207; *McHugh v. McCole* (Wis.), 12 N. W., 631. In the *Festorazzi* case, which is reported, also, in 25 L. R. A., 360, a devise exactly similar to those under consideration was held to be a trust, but not a charitable use, and, being a mere private trust, to be invalid for want of a living beneficiary. The New York cases upon this subject are in hopeless confusion. The Wisconsin case cited seems, in part at least, to be based on a local statute. We shall not attempt to go into an extended discussion of the authorities upon this question. In England, although the statute of Elizabeth, in its enumeration of charities, has no mention of churches, except in regard to their repair, it has uniformly been held that gifts for the maintenance or promotion of public worship were valid, as charitable uses, unless contrary to the established religion. Under St. 23 Hen. VIII, c. 10, declaring void all "uses and intents to have obits perpetually, or the continual services of a priest forever," etc., gifts for the saying of masses and prayers for the testator's soul or the souls of others were, until the repeal of that statute, held to be superstitious uses and void. Perry, *Trusts*, sections 701, 702. In this country no such doctrine as the English doctrine as to superstitious uses has ever prevailed. As judges, we have nothing to do with creeds or their orthodoxy. In the courts

all denominations stand upon the same footing, and are to be treated alike. As said by Mr. Perry (section 715): "In this country, where all religious denominations, doctrines and forms of worship are tolerated, or, rather protected, so long as the public peace is not disturbed, there can be, in the law, no such thing as a superstitious use." No such doctrine is invoked on behalf of appellants. The validity of the bequests is to be tested by the same principles that would be applied to a devise in aid of the religious observances of any other denomination. The mass, according to Webster's International Dictionary, is "The sacrifice in the sacrament of the eucharist, or the consecration and oblation of the host." It is as we understand it, a public service—a public act of worship—by which, according to the tenets of the Roman Catholic Church, the priest who celebrates it "helps the living and obtains rest for the dead." As said by the court in *Hoeffer v. Clogan*, 171 Ill., 462, 49 N. E., 527, 40 L. R. A., 730, 63 Am. St. Rep., 241: "It is intended as a repetition of the sacrifice on the cross, and it is the chief and central act of worship in the Roman Catholic Church. It is a public and external form of worship—a ceremonial which constitutes a visible action. It may be said for any special purpose, but, from a liturgical point of view, every mass is practically the same. The Roman Catholic Church believes that Christians who leave this world without having sufficiently expiated their sins are obliged to suffer a temporary penalty in the other, and among the special purposes for which masses may be said is the remission of this penalty. A bequest for such special purpose merely adds a particular remembrance to the mass, and does not, in our opinion, change the character of the religious service, and render it a mere private benefit. And while the testator may have a belief that it

will benefit his soul, or the souls of others doing penance for their sins, it is also a benefit to all others who may attend or participate in it. An act of public worship would certainly not be deprived of that character because it was also a special memorial of some person, or because special prayers should be included in the service for particular persons." A gift in other respects proper for the establishment of a church would not, in our judgment, be avoided by a provision that the church should be called by the name of the testator, or that a tablet or a memorial window should be erected therein bearing his name. Nor do we see any reason why the application of the fund to the designated purpose may not be enforced by the courts upon the application of the heir. We are of opinion, therefore, that the fourth and thirteenth clauses of the will are not objectionable, and that the judgment of the chancellor as to them was correct. The cases upon this subject may be found collated in an excellent note to the case of *Moran v. Moran*, as reported in 4 Am. & Eng. Dec. Eq., p. 55 (s. c. [Iowa] 73 N. W., 617, 39 L. R. A., 204, 65 Am. St. Rep., 443).

The next clause for consideration is clause 11, by which a trustee is selected and a trust created, the income whereof is to be applied in rewards of merit to poor pupils in the parochial schools of Louisville. A definite trustee is selected. The class to be benefited is plainly expressed; the intention is unmistakable; the bequest can be readily carried out by the named trustee, under the supervision of the court if necessary; and the object, plainly declared, is, in our judgment, a charitable one, within the meaning of the statute, being in aid of "schools of learning." A similar bequest providing for prizes for essays upon medical subjects was sustained in *Almy v. Jones*, 17 R. I., 270, 21

Atl., 616, 12 L. R. A., 414. As to this clause, the judgment of the chancellor is affirmed.

The bequest in the twelfth clause to the Bishop of Cork, to be applied to any charitable uses, and so as to do the most good, in his judgment, is practically identical in language with the bequest which was held invalid in the case of Spalding v. Industrial School, 107 Ky., 382 (21 R., 1107) 54 S. W., 200.

The point is made by counsel who was appointed attorney to defend for the Society of Jesus and the Bishop of Cork, upon the entry of the warning order, that their case is not before this court, because, although he filed demurrers for each defendant to the petition, and the chancellor declared these devises good, the judgment of July 11, 1901, neither overrules nor sustains either one of these demurrers, but only carries back to the petition the demurrers of the plaintiff to the answers filed by Bishop McCloskey and his associates and James M. Hayes. But inasmuch as the judgment dismissed absolutely the petition of the plaintiff, and seems to intend that the petition is dismissed as to all the defendants, we have considered the case as if all the parties named as appellees were before the court, and we are of opinion that the chancellor's ruling as to this clause was erroneous.

We shall next consider the twenty-second clause, bequeathing to the Order of the Society of Jesus, known as the "Jesuit Order," 100 acres of land at or near the testator's place, "Doneraile," in Jefferson and Bullitt counties, for the purposes of education or religion, they to have the privilege of selection on any lands on the west side of the Louisville & Nashville Railroad right of way. The Society of Jesus is a religious order founded by Ignatius Loyola. It is understood to be composed of mis-

sionary and teaching priests of the Roman Catholic faith. As we understand it, there is no legally incorporated body, but the priests are bound only by their vows of poverty, chastity and obedience, and, after a second novitiate, by a fourth vow, requiring them to go wherever the pope may send them for missionary duty. They are governed by a general, and the society has been established in the United States for many years; but this record does not disclose the headquarters of the society, or the names of any of its officers. It would seem, therefore, that there is no trustee created by this bequest who can be made subject to the control of the court, and compelled to execute the provisions of the trust. The lack of a trustee, however, would be immaterial under our statute, and the trust would not be permitted to fail because an "inadequate, illegal, or inappropriate" mode of execution had been prescribed, provided the charity were to "an identified or ascertainable object," which could be judicially determined, and thereby effectuate the declared intention of the donor. Is there such an object in this case? Can the court, unable to bring the Society of Jesus before it, appoint a trustee, and select for his execution a religious or educational object, which will effectuate the intention of the donor, "and not arbitrarily and in the dark, presuming on his motives or wishes, declare an object for him?" We do not think so. Whatever educational or religious purpose the chancellor, or his trustee, or this court, might select, would be open to the objection that it was not the declared intention of the testator, and that it was possibly an object of which he would not have approved. To effectuate a charitable use in this State, it is necessary that the courts should be able to control the trustee, and, if necessary, upon the application of the decedent's heirs at law, revise his action.

Should we attempt to do so in this case, we should not be acting judicially. As said by Judge Robertson in *Moore's Heirs v. Moore's Devisees*, 4 Dana, 366, 29 Am. Dec., 417, the court "does not act judicially when it applies his bounty to a specific object of charity, selected by itself, merely because he had dedicated it to charity generally, or to a specified purpose which can not be effectuated; for the court can not know or decide that he would have been willing that it should be applied to the object to which the judge, in the plenitude of his unregulated discretion and peculiar benevolence, has seen fit to decree its appropriation, whereby he, and not the donor, in effect and at last, creates the charity." We are of opinion that the bequest in the clause under consideration is clearly within the rule laid down in the *Spalding* case, and is invalid.

We come now to the consideration of the residuary clause, being clause 20: "All the remainder of my estate, after the payment of the specified legacies and bequests, I wish to be invested and placed in trust with the Rt. Rev. Bishop of the Catholic Diocese of Louisville, and three others, to be chosen by him, for the establishment of a home for poor Catholic men, as soon as the proceeds of my estate may justify it." This clause also is attacked upon the ground that it is too indefinite to be executed, and counsel upon both sides have argued it with great zeal and learning, and not altogether without temper. There is no objection to the trustee selected, and we see no valid objection to the power granted him to select his colleagues. The sole question is whether the object for which this bequest is made is sufficiently definite to be enforced. Upon this question the argument has taken such a range as to render necessary a consideration of the history of the statute in force at the date of the testator's death. The stat-

ute of 43 Elizabeth (chapter 4) came to us by virtue of the ordinance of Virginia of 1776 (9 Hen. St. at Large, p. 127, which is printed in 1 Morehead & B., p. 612), providing: "That the common law of England, all statutes or acts of parliament made in aid of the common-law prior to the fourth year of the reign of King James the First, and which are of a general nature, not local to that kingdom, . . . shall be the rule of decision, and shall be considered as in full force, until the same shall be altered by the legislative power of this colony." That ordinance was, by the Constitution of 1792, as re-enacted in the Constitution of 1799 (article 6, section 8), adopted as the law of Kentucky by a provision that: "All laws which on the first day of June one thousand seven hundred and ninety-two were in force in the State of Virginia, and which are of a general nature, and not local to that State, and repugnant to this Constitution, nor to the laws which have been enacted by the Legislature of this Commonwealth, shall be in force within this State, until they shall be altered or repealed by the General Assembly,"—citing *Hunt v. Warnicke's Heirs*, Hardin, 62. It is an interesting fact that in November, 1792, a few months after the adoption by Kentucky of this ordinance, it was repealed by Virginia, which accounts in some measure for the difference between the rulings upon charities in Virginia from those which prevail in Kentucky. The question has been elaborately argued how far the statute of Elizabeth (to be found in 1 Morehead & B. p. 308) was adopted as the law of this State, appellees contending that only the preamble was thereby adopted, because the 10 enacting clauses of the act are necessarily local to England, and were, therefore, never adopted by either Virginia or Kentucky. On behalf of appellants it is contended that, while the mode of procedure

prescribed by the statute by the appointment of commissioners under the great seal of England, or the seal of the county Palatine of Lancaster, as the case might require, was local to England, and not adopted by either Virginia or Kentucky, yet a corrective process by the court of chancery itself, without the intervention of commissioners, was obtained in virtue of the statute, and as an outgrowth of it, by the English chancellor, and, to the extent it was judicial, was adopted by the constitutional adoption of the Virginia ordinance, and asserted and exercised by the Kentucky courts. An examination of the authorities convinces us of the correctness of appellant's contention. It is undoubtedly true that after the adoption of the statute in England the courts asserted and exercised wider powers in the correction of abuses of charitable trusts, and did so directly, and not through the intervention of the commissioners provided by the statute. And so it was natural that when the Kentucky courts came to consider the application of the statute thus adopted to Kentucky charities, they should adopt with it the outgrowth of power derived from the chancellor's personal exercise of the royal prerogative to the extent that it had been exercised in England, because it had come to be there exercised, in form at least, judicially. And it was natural that the Kentucky courts should at first have regarded all the powers which had grown out of the concurrent exercise and subsequent confusion of the judicial and prerogative power as not local to England, and should have sought to localize them in this State. And so we find Judge Nicholas, in *Gass v. Wilhite*, 2 Dana, 177, 26 Am. Dec., 446, asserting in the broadest terms, not only that the statute was in force in Kentucky, but the existence of the English *cy pres* doctrine to its fullest extent. Said Judge Nicholas: "Notwithstanding

the attention of counsel had been invited to the question whether the statute 43d of Elizabeth, of charitable uses, was in force here, it was not contended on the argument that it was not. Our own reflections have not led to any plausible suggestion why it should not be considered as in force. It has never been repealed, nor is there anything in it of so peculiar and local a character as to exclude it from adoption, under the rule embracing all English statutes of a general character prior to 4 James I. It is treated as in force, and has been acted on, in several of the other States. The establishing of the fact that it is still in force relieves us from the necessity of investigating the very vexed question as to the true extent of chancery power and jurisdiction over charitable uses, independent of that statute. It also relieves us from an investigation of the question whether, according to the principles of the common law, there is here a defect or want of *cestuis que trustent*, to take the use according to the apparent intent of the covenant of association; or whether the uses themselves are of too indefinite and uncertain a character to be enforced, independent of that statute; for, according to a construction of 200 years, and which has been acted on in numberless cases under that statute, neither of those circumstances will invalidate the trust, provided it be a charitable use. Where the objects of the charity and the mode of its application are pointed out, but not with sufficient distinctness or certainty to be specifically and accurately enforced, the court will, under its *cy pres* doctrine, give it effect, as near the general intent as may be; and even where there is no specific mode or object pointed out, and in some cases where the object fails or ceases to exist, the court will, in respect of the general charitable purpose, devise a mode itself for giving it effect and employing the chari-

table funds, supply an original want of trustees, or, if necessary, displace old and create new ones." Almost immediately thereafter, in *Moore's Heirs v. Moore's Devisees*, 4 Dana, 366, 29 Am. Dec., 417, Chief Justice Robertson greatly limited the doctrine laid down in the *Gass and Wilhite* case, still asserting, however, the cy pres doctrine as a judicial doctrine to a limited extent. In the *Curling* case, 8 Dana, 38, 33 Am. Dec., 475, it was held that a devise for the "benefit of a public seminary" was "not, as at common law, void. The statute makes it valid according to the British doctrine. And, if it can be judicially executed, it is good according to the Kentucky doctrine also." And so Judge Robertson held that the testator intended his bounty for the seminary of his county, and that, "even if the Trigg Seminary could not claim the bounty as a matter of clear and exclusive right, nevertheless we are of the opinion that the application of the fund to that seminary would effectuate the declared purpose of the testator more certainly and appropriately than any application that could be made of it to any other seminary of learning." The statute is clearly here recognized not as merely giving a definition of charities or a list by which gifts supposed to be charitable might be tested, but as giving to the courts and judiciary of Kentucky certain remedial and corrective powers which would not be possessed by them in the absence of the statute. So, in the much-criticised opinion of Judge Breck, in *Attorney General v. Wallace's Devisees*, 7 B. Mon., 612, an exceedingly loose devise was held to give the testator's "trustworthy friends," his trustees, power, under the statute of Elizabeth, to select as beneficiaries of the will certain established benevolent and charitable institutions then in existence. The validity of the clause and the propriety of the proceeding by the attorney general as well are sustained

expressly under the statute of Elizabeth, and the power of the court to enforce the trust by a scheme is asserted. In 1852, the statute now under consideration was adopted. It took the preamble of the former statute, with some described changes, added to the list a few charitable objects—notably churches, which, as Mr. Perry says, had been, “by analogy, deemed within its spirit or intendment”—and added also the words, “or for any other charitable or humane purpose,” which can hardly be construed to do more than include the charitable purposes which had already been deemed within the spirit and intendment of the old act, and provided that all grants, etc., for such purposes should be valid, except as thereafter restricted. It provided, also: “No charity shall be defeated for the want of a trustee or other person in whom the title may vest; but courts of equity may uphold the same by appointing trustees, if there be none, or by taking control of the fund or property and directing its management and settling who is the beneficiary thereof.” Now, if there is a difference between this statute and the former one, which was held by the Kentucky decisions to be in force here, what effect did it have, and what was its purpose? Was it intended to, or did it, broaden the scope of the old statute, as is contended by counsel for the Society of Jesus and the Bishop of Cork? We can not think so. That statute, even in Kentucky, and even after the great opinion of Judge Robertson in the Moore case, which undertook to confine the English *cy pres* doctrine within the limits of strictly judicial powers, had received construction which could not have suggested to the legislative mind any necessity for broadening the scope of the act. If there was need of legislation, it was in the other direction. Such trusts shall be valid, says the statute. How valid? Then the statute proceeds

Coleman, &c. v. O'Leary's Exr., &c.

to point out the modes in which they may be validated: First, a trustee may be supplied, if necessary, in whom the title may vest; or the court may take control of the fund or property. The court may direct the management of the property, and may settle who is the beneficiary. Is there anything in this, fairly construed, that indicates an intent to empower the courts to give definition to trusts which the grantors failed to define, to furnish an intent when none is expressed, to direct the management of a fund devoted to an unascertainable object, or to settle who is the beneficiary when the testator left no clew? That statute was intended, not to enlarge, but to define, the powers of the court. As illustrative of this intent, we find incorporated in the third section the mortmain statute of 1815, limiting the amount of landed estate which may be held by any church or society of Christians.

We do not for a moment suppose this enactment was intended as a hostile attack upon charitable uses, or as looking toward such a crusade against them as took place in the time of Henry VIII; but that it was intended to limit, to define, and to set boundaries to the powers of the courts we have no manner of doubt, from an examination of the statute itself; and this construction was given to it by perhaps the greatest of our judges, in the only opinion of this court in which the effect and object of the Kentucky statute appear to have been considered and adjudged. The same great judge had, in the Moore case, undertaken to limit the application of the *cy pres* doctrine by the chancellor. The doctrine then announced had not been rigidly adhered to. In *Attorney General v. Wallace's Devises*, 7 B. Mon., 612, and in the *Curling* case, 8 Dana, 38, 33 Am. Dec., 475, the results of the opinions by Judge Breck and by Judge Robertson himself are not sup-

ported by the doctrine announced in the Moore case, though the intent of the testators was declared to exist in such form as to make that doctrine applicable. But in *Cromie's Heirs v. Louisville Orphans' Home*, 3 Bush, 373, the effect of the Kentucky statute was considered. Said the court, through Judge Robertson: "While the statute of Elizabeth concerning charities was constructively abolished in Kentucky (1 Rev. St. p. 177), it was, in American phase, substantially re-enacted. *Id.*, p. 235. And thus, though the ultrajudicial cy pres doctrines which royal prerogative attached as excrescences to the statute of Elizabeth had, by its repeal, been cut off as tumors, the aim of our own statute for upholding charities is to make such as it enumerates available whenever so defined as to be judicially identified and applied." The English statute was re-enacted, but "in American phase." Charities could still be created according to American doctrine. The outgrowth of the English statute was not to exist here, and the aim of our own statute was compactly and definitely expressed. It was a conservative enactment. It did not put charitable uses upon the same plane as private trusts. They were not void as against the statutes as to perpetuities. They were not to be defeated for want of a trustee. They were not required to be so definite as to be valid as private trusts. But the "American phase" of the statute of charitable uses did require a reasonable certainty, for it required the charitable objects to be so defined as to be judicially identified. The courts were no longer to exercise the prerogative of changing or making wills; and the judge refers approvingly to the repudiation of the cy pres doctrine in New York, and to the strictly judicial application of charities in that State. He believed, and said so in the opinion, that the object of the repeal of the British statute

"was to substitute a system more congenial with our institutions, and, by a legislative indorsement of the doctrine suggested in *Moore's Heirs v. Moore's Devisees*, supra, to eliminate the *cy pres* doctrine of England." We find nothing in the statute to indicate that it was intended as an enabling act, as the statute of Elizabeth was. It does not undertake to enlarge the power of the chancellor in any way. It gives no power to enforce an indefinite gift. It provides that a trust shall not fail for want of a trustee, but it does not empower the courts to create a *cestui que trust*. The court will, under the statute, settle who are the beneficiaries of a trust, if one is created, but it must settle them from the words of the gift; they must be judicially ascertained. It is not doubted that the individual beneficiaries of the bounty need not be named. That would render the gift a mere private use, and subject to the rule against perpetuities. And while the donee of a power may create or cause to spring a private use, limited in duration by the law against perpetuities, such is not the law as to charitable uses, which are perpetuities. The donor must select his charity. He may delegate power to select the individual recipients of his bounty, but a gift to charity in general is too vague to be enforced. *Spalding v. Industrial School* (107 Ky., 382) (21 R., 1107) 54 S. W., 200. A charitable use which is relieved from the operation of that rule must be so definitely expressed that the courts can judicially, and with reasonable certainty, apply the gift to that object.

We may notice here the very interesting argument of appellants' counsel as to the difference between the statute of Elizabeth and the Kentucky statute. In the older statute, these words are used, "for relief of aged, impotent and poor people," while our statute reads, "for the relief

or benefit of aged, or impotent and poor people;" from which it is argued that, while the older statute might have permitted a charity for the poor, though not helpless, or for the aged, though not poor, our statute does not permit a charitable use for the benefit of the rich, though old or impotent, or for the poor, unless they were old or impotent. But we think the distinction sought to be made lies only in the language used, and does not exist in the meaning of the two statutes. In the old statute, as in the new, the poor and the aged for whose relief charitable uses were permitted were the poor and the aged who needed charity, and under neither statute would a charity for sturdy beggars or elderly millionaires be properly sustained. And so we think it is with such language when used in a gift to be applied under either statute. The "poor" will be construed to mean, not the poor who are abundantly able to provide for themselves, but the poor who need assistance; and "aged" to mean such aged people as are properly objects of charity.

Nor do we think that the devise in question is objectionable as a sectarian charity, or as a devise to provide for hospitality rather than charity. This court has never recognized it as an objection to a charitable use that its bounty was confined to members of one race or one religion. Nor, on the other hand, do we think that the word "poor," as used in this devise, can be properly construed as indicating a merely hospitable purpose. The purpose of this devise was, in our judgment, charitable. The sole question is whether it was definite enough to be enforced.

Tested by this statute, is the bequest too vague and indefinite to be sustained? It is suggested for appellee that, in order that the court may be able to exercise the powers given by section 2 of the act (1 Revised Statutes, p. 236),

directing the management of the trust and settling who shall be the beneficiaries thereof, the will must be construed as requiring the establishment of the home in Louisville, because the trustee is the Bishop of the Diocese of Louisville, the trust is reposed in him in his official capacity, and he has no power beyond his diocese. On the same principle it would seem to follow that the beneficiaries must be selected from that diocese, which, as we understand, includes the State of Kentucky. If the devise can be sustained, it must be upon such a construction, and that is the interpretation we must give it in order to make it sustainable.

On the other hand, these objections are urged to the validity of the devise: First, that it does not name a charitable object under our statute, which requires that the poor who may be beneficiaries of a charitable use must also be aged or impotent—an objection already considered; second, because no power is given to any one to select the object of the charity; third, because no place or district or country is named in which the home is to be established, and no place or district or class is reasonably defined from which the beneficiaries are to be selected; and, fourth, because no one is given power to make such selections. Assuming the object of the devise to be sufficiently definite, we have little difficulty with the second objection. A trustee is named, the appointment of three associates is provided for, and the fund is devoted "for the establishment of a home for poor Catholic men as soon as the proceeds of my estate may justify it." And, if the will furnishes a guide to the purpose of the testator, the trustee and his associates have authority to act in the selection of a site for the home, and in its establishment and management under the control and direction of the chancellor. But it is objected that

there is nothing in the will which places any limitation of time or place or circumstances upon the establishment of the home, or any limitation of district or boundary or class which will enable us to judicially ascertain or identify the objects of the testator's bounty. With considerable hesitation, and after much consideration, the court has reached the conclusion that a construction can fairly be given to this clause of the will sufficiently definite to enable the trustee to carry out, and the court to control and enforce, the testator's charitable purpose. The trustee selected to receive the trust fund is not selected as a person, but as an official of the church. He is the Right Reverend Bishop of the Catholic Diocese of Louisville. As such he has under his immediate dominion not only such matters as are strictly ecclesiastic, but to a great extent the charities of the church. Whether he still exercises the powers of a corporation sole this record does not disclose, but he undoubtedly exercises supervision over the recognized charities of the Roman Catholic Church in his diocese. And while there is a recognized distinction between a gift to create a charitable institution, without naming its scope or location or designating, territorially or otherwise, the class from which the beneficiaries are to be selected, such as appellants claim the gift in question is, and a gift for the purpose recognized as charitable under the statute to an established and organized institution having defined and stated aims and purposes, which by virtue of the selection of that institution can be written in the terms of the gift, it may be that there is a just analogy between gifts of the latter class and a gift for a recognized charitable purpose to a church official in his official capacity, having jurisdiction as such over the charitable institutions of like char-

acter within a defined territory, and managed under regulations and upon conditions which may be considered as adopted by the donor by the selection of such official, and thereby written into the terms of his gift. It may not be too great a stretch of the court's powers of interpretation to presume that the donor made the gift upon terms in harmony with the purposes of kindred organizations in that ecclesiastical jurisdiction, and for the benefit of such similar objects of charity as are provided for in that district. Giving this construction to the clause in question,—that the home was intended to be established in Louisville, and that the beneficiaries were to be selected from Catholic poor men in that diocese—it follows that the trust is such as the chancellor can control and enforce, and, if necessary, settle who are the beneficiaries thereof. It follows, therefore, that the judgment of the chancellor as to this clause was not erroneous.

The paragraphs of the answer which plead knowledge on the part of the appellants of the administration under the will are good to the extent that, in so far as the appellants have knowingly permitted the executors and trustees under the void clauses to proceed with the execution of the will as if valid, and to expend the fund for the benefit of the supposed objects of charity, no recovery can be had, nor, if investments have been made in execution of the supposed purposes of the void clauses, can recovery be had for the loss, if any, occasioned by such reinvestment.

In the particulars indicated in the opinion, the action of the chancellor in carrying back and sustaining the demurrer to the petition was erroneous. The demurrer should have been sustained in part, as indicated herein.

If appellants can show a refusal to recognize their visitatorial right, or if any abuse of the trust or misapplication

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of the fund can be shown, the court can enforce such right. In this respect the petition seems to be defective, and on the return of the cases leave may be given to amend.

For the reasons, given and to the extent indicated, the judgment is reversed, and cause remanded with directions to set aside the judgment dismissing the petition, and for further proceedings consistent herewith.

Whole court sitting.

Judge Paynter dissents from so much of the opinion as holds the bequest to the Jesuit order void.

Petition for rehearing by appellee overruled.

CASE 47—PETITION BY AUDITOR'S AGENT BY COMMONWEALTH FOR MANDAMUS AGAINST THE COUNTY JUDGE TO COMPEL HIM TO TAKE JURISDICTION IN A CASE WHERE PROPERTY HAD BEEN OMITTED FROM TAXATION.—DEC. 17.

Commonwealth, *ex rel.*, &c. v. Newell, Judge.

APPEAL FROM MASON CIRCUIT COURT.

JUDGMENT SUSTAINING DEMURRERS TO PETITION AND PLAINTIFFS APPEAL.—REVERSED.

MANDAMUS—PROPERTY OMITTED FROM TAXATION—JURISDICTION OF COUNTY COURT.

Held: 1. Kentucky Statutes, section 4241, requires the sheriff or auditor's agent to cause to be listed for taxation all property omitted by other officers, and to file in the office of the clerk of the county a list of the property; provides that at the next regular term of the county court, if it shall appear to the court that the property is liable to taxation, and has not been assessed, it shall enter an order fixing its value, and, if not liable, it shall make an order to that effect; and that from so much of the order deciding whether the property is liable to assess-

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ment either party may appeal. HELD that, where the court declines to consider the question of liability of the property to taxation, there can be no appeal, so that mandamus will lie to compel the court to consider the matter.

A. E. COLE & SON, R. J. BRECKINRIDGE AND JOHN S. POWER,
FOR APPELLANT.

The Chesapeake & Ohio Railway Company, was incorporated in Virginia and in West Virginia, and by contract, on January 1, 1887, obtained control and possession of the road bed and appliances of the Maysville & Big Sandy railroad company, which is a Kentucky corporation. In 1893 said C. & O. Railway Company became a domestic corporation in compliance with section 841, Kentucky Statutes. It has never paid any taxes on its lease of the Maysville & Big Sandy Railway Company, which lies wholly in Kentucky, and is worth at least fifteen million dollars, and said C. & O. has never paid any tax in this State on its franchise, although it confessedly has a capital stock of over sixty-two million dollars, with no tangible property in this State.

The appellant, auditor's agent, filed a statement setting forth these facts and instituted a proceeding in the Mason county court, through which county said leased railroad runs, to obtain a compulsory assessment or valuation by said county court of said lease and franchises for transmission to the auditor, who after due notice to the company, could finally fix the value of said omitted property for taxation. The county judge refusing to act, appellants filed a petition in the Mason circuit court for a mandamus to compel the county court to entertain jurisdiction and try the case. To this petition a general demurrer was filed which was sustained by the circuit court solely on the ground that the remedy of mandamus can not be invoked to compel appellee to proceed with the case. Appellant's petition was therefore dismissed, from which judgment this appeal is presecuted. We contend:

1. That the county court is not an exclusively judicial tribunal, and, in assessing property for taxation, it acts ministerially. *Pennington v. Woolfolk*, 79 Ky., 16.

2. That the remedy of mandamus lies not only to compel the performance of a ministerial duty, but also to compel an inferior tribunal to act.

3. That the Virginia and West Virginia railroad corporations although foreign, owe the State of Kentucky taxes on their fran-

Commonwealth, *ex rel.*, &c. v. Newell, Judge.

chises, beginning with March 11, 1890, at which time the Hewitt law was amended, requiring *all* corporations to pay taxes on their franchises.

AUTHORITIES CITED.

Pennington v. Woolfolk, 79 Ky., 16; Cassidy v. Young, County Judge, 92 Ky., 232; Booe, County Judge v. Kenner, 49 S. W., 330; C. & O. Ry. Co. v. Com., 101 Ky., 161; Kirk, Sheriff v. Western Gas & Oil Co., 37 S. W., 849, Ky. Statutes, secs. 4039, 4058; L. & N. R. R. Co. v. Com., 95 Ky., 68; Henderson Bridge Co. v. Com., 99 Ky., 629; Bourbon Stock Yard Co. v. Com., 13 R., 926; Gibson v. Belcher, 1 Bush, 147; Adams Express Co. v. Ohio State Auditor, 166 U. S., 218; Ferrell v. Kimble, 75 Tex., 476; Kentucky Constitution, secs. 202, 211, vol. 13; Am. & Eng. Ency of Law, p. 84; Louisville Trust Co. v. Louisville, &c., R. R. Co., 75 Fed. Rep., 433; Clark on Corp., p. 87; N. N. & M. V. Co. v. McDonald-Brecks Co.'s Assignee, 59 S. W., 334; Kentucky Statutes, secs. 4260, 4241; Fleming Clerk v. Sinclair, 57 S. W., 370; Mall Co. v. Barbour, 88 Ky., 73; L. & N. R. R. Co. v. Com., 1 Bush, 258; L. & N. R. R. Co. v. Com., 85 Ky., 208; South Covington, &c., Ry. Co. v. Town of Bellevue, 49 S. W., 25; L. & N. R. R. Co. v. City Barbourville, 48 S. W., 936; Louisville & Jeff. Ferry Co. v. Com., 57 S. W., 626.

ADDITIONAL AUTHORITIES BY JOHN S. POWER, FOR APPELLANT.

Hoke v. Com., 79 Ky., 567; L. & N. R. R. Co. v. Com., 1 Bush, 250; Kentucky Statutes, secs. 4241, 4077, 4084, 4078; Sutherland on Statutory Construction, secs. 218, 219, 331, 332, 341, 343, 337, 340, 342, 344 and 345, also secs. 206, 20, 409, 410, 411, 416 and 417.

W. H. WADSWORTH, FOR APPELLEE.

CLASSIFICATION OF AUTHORITIES.

1. Mandamus was not the proper remedy in this case. Cassidy, &c. v. Young, 92 Ky., 229; Shine, &c. v. Railroad Co., 85 Ky., 179; Dickens v. Cave Hill Cemetery Co., 93 Ky., 389; Booe, County Judge, &c. v. Kenner, 49 S. W., 331; Galbraith v. Williams, 50 S. W., 687; Atkinson, &c. v. Riley, 63 S. W., 752; Hoke v. Commonwealth, 79 Ky., 567.

2. Mandamus will not lie where there is any other adequate remedy. Kentucky Statutes, sec. 4241; Adair v. Hancock Deposit Bank, 53 S. W., 297; Shine, &c. v. Railroad Co., (*supra.*) 85 Ky., 177; Preston, &c. v. Fidelity, &c. Co., 94 Ky., 295;

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State, &c. v. McKee, 51 S. W., 424; High on Ex Rem., 3d ed., sec. 16; Aycock, &c. v. Clark, 60 S. W., 666; *Ex parte* Newman, 14 Wall., 169, 170.

3. Mandamus won't fit relator's prayer. Cassidy, &c. v. Young, (Supra.) 92 Ky., 229.

4. There was no allegation in the petition or statement showing that any property had been omitted. Sec. 4241, Kentucky Statutes; sec. 4090, Kentucky Statutes; sec. 4097, Kentucky Statutes; secs. 4087, 4091, Kentucky Statutes; Howes v. Walker, &c., 92 Ky., 258.

5. County court had no jurisdiction. General Statutes, 1873, p. 744; General Statutes, 1887, p. 1042; Kentucky Statutes, sec. 4102; General Statutes, 1887, p. 1025; General Statutes, art. 4, chap. 92; Kentucky Statutes, secs. 4096 to 4104; Kentucky Statutes, sec. 4077; Board of Councilmen v. Stone, 56 S. W., 680; Board of Councilmen v. Stone, (Supra.); 58 S. W. Rep., p. 373; C. N. O. & T. P. R. R. Co. v. Com., 81 Ky., 492; Ky. R. R. Tax Cases, 115 U. S., 321; Vanceburg, &c. T. P. R. R. Co. v. M. & B. S. R. R. Co., 63 S. W., 749; Louisville Tobacco Wh. Co. v. Com., 49 S. W., 1070; State v. Austin, &c., R. R. Co., 60 S. W., 886; State, &c. v. Nashville, &c., R. R. Co., 34 S. W., 1023; Louisville & Jeffersonville Ferry Co. v. Com., 57 S. W., 624; Vanceburg, &c. Co. v. M. & B. S., (Supra.)

OPINION OF THE COURT BY CHIEF JUSTICE GUFFY—REVERSING.

It appears from the petition in this case that F. Stanley Watson, auditor's agent, filed in the clerk's office of the Mason county court a statement authorized by Kentucky Statutes, section 4241, the object of which was to have certain property belonging to the Chesapeake & Ohio Railway Company assessed for taxation. It further appears that the county court of Mason county refused to take jurisdiction of the complaint, and refused to determine whether or not said property was liable to assessment or subject to taxation. The object of this action is to obtain a writ of mandamus against the county judge of Mason county requiring him to entertain jurisdiction of said case, and to decide the same on its merits, to proceed upon the facts pleaded before him by the relator, to ascer-

tain as near as practicable, and to cause to be forwarded to the auditor, the compulsory reports of these corporations thus obtained, and to proceed as required by law. To this petition a demurrer was filed on behalf of the defendant on the ground that the petition did not state facts sufficient to constitute or support a cause of action, which demurrer was sustained by the court, with leave to plaintiffs to amend, and, they declining to amend, the petition was dismissed, from which judgment this appeal is prosecuted.

The only question which we deem it necessary to consider is whether or not appellants were entitled to the peremptory mandamus, and we shall not undertake to decide whether the property sought to be subjected to taxation was in law liable to assessment or taxation. It will be seen from this record that the appellee county judge refused to try or consider the question as to the liability of the railway, or whether the property in question had been omitted by any of the authorities authorized to assess the same. In short, the county judge declined to try and pass upon the legality of plaintiff's claim, and it appears also that from the petition, and as a matter of law, we hold that no appeal could be prosecuted from the order of the county judge aforesaid. It is contended for appellee that the writ of mandamus could not be legally issued. If this be true, and if also it be true that there is no appeal from the order refusing to entertain jurisdiction, then the appellant is without any remedy. It will be seen from an examination of section 4241, Kentucky Statutes, that it is made the duty of the sheriff or auditor's agent to cause to be listed for taxation all property omitted, or any portion of property omitted, by the assessor, board of supervisors, board of valuation and as-

assessment, or railroad commission, for any year or years. The section further provides for the filing of a statement containing a description etc., of the property, and the value of corporate franchise, if any, together with the names and places of residences of the parties owning such property. It is further provided that at the next regular term of the county court after notice has been served five days, if it shall appear to the court that the property is liable for taxation, and has not been assessed, the court shall enter an order fixing the value thereof at its fair cash value, estimated as required by law, if not liable, he shall make an order to that effect. It is further provided as follows: "From so much of the order of the court deciding whether or not the property is liable to assessment, either party may appeal, as in other civil cases, except that no appeal bond shall be required where the court decides that the property is not liable to assessment or taxation." Various other provisions are embraced in the section not necessary to refer to. It seems clear to us that there can be no appeal from any order of the county court in respect to the matter in controversy, except as provided by the section supra; and, inasmuch as the court refused to adjudge whether or not the property was liable to assessment or taxation, and that being the only judgment or order from which an appeal is allowed, it seems clear that no appeal could be prosecuted from an order dismissing the proceeding without rendering a judgment as provided by law.

If the facts stated by plaintiff are true, the property in question was omitted; but as before stated, we shall not undertake to decide whether the property ought to have been assessed in Mason county, or whether it had been omitted. That question must be primarily decided by the county court of Mason county. It seems to us that the

Commonwealth, *ex rel.*, &c. v. Newell, Judge.

duty and power of the circuit court to issue a mandamus in a case like the present one is not an open question. This court, in *Hoke v. Com.*, 79 Ky., 567, 3 R., 407, discussed at great length the duty of the county court to make an assessment of omitted property upon the institution of proceedings in the county court by the auditor's agent; and also expressly held that, where the county court failed to hear and determine as to the liability of the property to assessment, a mandamus should be awarded against him—not to control his judgment as to the liability of the property to assessment, but merely to compel him to hear and determine that question. The common pleas court of Jefferson county had awarded a mandamus to compel the county judge to hear, consider and determine the question, and this court, in a very exhaustive opinion, affirmed the judgment of the common pleas court.

We deem it unnecessary to discuss the various authorities relied on by the parties. We are of opinion that it was the duty of the county judge to hear the case presented by the auditor's agent, and render a judgment holding the property liable to be assessed, or holding that it was not liable; in which event either party could have appealed to the circuit court. The dismissal by the county judge for lack of jurisdiction was in no sense a judgment determining whether the property was liable to assessment or not.

For the reasons indicated, the judgment appealed from is reversed, and cause remanded, with directions to the circuit court to overrule the demurrer, and for proceedings consistent herewith.

Judges Paynter, Hobson and Burnam dissent.

Petition for rehearing by appellee overruled.

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CASE 48—ACTION BY ANGELINA KLOSTERMAN AND OTHERS AGAINST THE C. & O. RY. CO., &C., TO RECOVER DAMAGES FOR THE UNAUTHORIZED CONSTRUCTION OF A RAILROAD TRACK NEAR PLAINTIFF'S PROPERTY.—DEC. 17.

Klosterman, &c. v. Chesapeake & Ohio Ry. Co., &c.

APPEAL FROM THE KENTON CIRCUIT COURT.

JUDGMENT FOR DEFENDANTS AND PLAINTIFFS APPEAL. REVERSED.

RAILROADS—TRACKS IN THE STREET—DAMAGES TO ABUTTING OWNERS' LIMITATION OF ACTION—MEASURE OF DAMAGES.

Held: 1. While the right to sue a railway company for damages caused to abutting property, by reason of the construction and operation of a railway track in a street pursuant to legislative and municipal authority, is barred by the five years' statutes of limitations, in a like action for damages for the construction and operation of such track in a street without such authority, the fifteen-year statute of limitation applies.

2. Where a railroad company is authorized by legislative and municipal authority to construct and operate a single railway track in a street, and concurrently constructs two tracks in such street, an additional servitude is thereby imposed upon property abutting on said street, and damages can be recovered by the owner of such property for the construction and operation of the double track by an action instituted within fifteen years from the construction of said tracks, and in such case the measure of recovery is, whatever damages the abutting property owners have sustained by reason of the construction and operation of two tracks in said street, which they would not have sustained by the construction and prudent operation of one track therein.

HARVEY MYERS, ATTORNEY FOR APPELLANT.

1. Authority to construct and operate a single track railway upon the public streets of a municipality does not authorize the construction or operation of a double track railway. Grants of this character are construed most strongly against the grantee, and nothing passes by implication. The affirmative must be shown by the claimant. Silence is negation and doubt is fatal to the claim. *N. W. Fertilizing Co. v. Hyde Park, U. S.*

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Sup. Ct., 24 L. ed., 1038; Conn. v. Erie & N. E. R. R., 27 Pa. St., 339; P. A., &c., R. R. v. Phil. & Read. R. R., 157, Pa. St., 42; Woods on R. R., sec. 223; Ruttle v. E. L. & B. S. R. R., 10 S. W., 644.

2. Where a corporation undertakes to execute a power conferred by charter, it must act strictly within the limits of such power, and it must be conferred in express terms, for such powers never arise by implication. Harris on Damages, sec. 184; C. B. & Q. R. R. Co. v. Gurney, 139 Ill., 355.

3. Where a railroad company exceeds the powers conferred upon it by the Legislature, or unnecessarily exercises those powers in a manner which produces serious injury to property or its comfortable enjoyment, its acts create a nuisance which a court of equity will enjoin, or a court of law redress by damages. Wood on R. R., vol. 2, p. 1053; Porth v. Manhattan Ry. Co., 26; Jones & Spencer (N. Y. Superior Ct.) 374.

4. Where a railroad company exceeds the authority granted it to construct and operate its railroad in the streets of a city, or constructs and operates it in a manner not authorized by law, it constitutes a nuisance, and the statute of limitations does not run against the claim of persons, whose property is damaged by such nuisance.

JOHN GALVIN, B. D. WARFIELD AND EDWARD W. HINES, FOR
APPELLEE.

PETITION FOR REHEARING.

POINTS AND CITATIONS.

1. The mandatory requirement of the charter of the bridge company that it should construct tracks connecting its bridge with the Kentucky Central Railroad was an implied grant of the use of the streets of the city for that purpose without the consent of the city, and the provision of the charter requiring a permit from the city council in order to connect with any depot in the city has no application.

The Legislature may grant to a railroad company the right to construct its tracks in the streets of a city without the consent of the municipality. L. & N. R. R. Co. v. Orr, 91 Ky., 109; Ruttle, &c. v. City of Covington, 10 Rep., 766. Such legislative authority need not be expressly conferred, but may be given by implication. 2 Dillon on Municipal Corporations, sec. 707.

2. If the meaning of the charter be doubtful, the doubt should be resolved in favor of the practical construction adopted by all parties in interest for many years. Sutherland on Statutory Construction, sec. 312; State v. Severance, 49 Mo., 401; Givens' Exrs. v. Providence Coal Co., 22 Rep., 1217.

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3. Even if a permit from the city council for the use of the streets was necessary, no reason existed why it should not be given by resolution, or even by mere acquiescence. And therefore, a resolution by the council reciting that it had granted the right of way was a sufficient permit. *Pembroke v. Canada Central Ry. Co.*, 14 Am. & Eng. R. R. Cases, 117 (3 Ontario, 503.)

4. The acquiescence of the city council in the construction of the double track was at least sufficient to create an estoppel, as was also the acquiescence of the abutting lot owners.

One who acquiesces in the construction of a railroad on his land or over a street in front of his property thereby consents, and is estopped to maintain either ejectment or injunction. *Halbert, &c. v. Maysville, &c. R. R. Co.*, 98 Ky., 661; *Louisville, &c. Ry. Co. v. Stephens, &c.*, 96 Ky., 401; *Ferguson, &c. v. Cov. and Cin. Elevated R. R. Co., &c.*, 22 Rep., 371; *Porter v. Midland Railroad Co.*, 125 Ind., 476; *Reichert v. St. Louis, &c. R. R. Co. (Ark.)*, 38 Am. & Eng. R. R. Cases, 453.

5. The doctrine of estoppel applies to a municipal corporation. *Kneeland v. Gilman*, 24 Wis., 39; *Herman on Estoppel*, sec. 1222; *C. & N. W. Ry. Co. v. The People, ex rel. City of Elgin*, 91 Ill., 251.

Even if there was neither legislative nor municipal authority for the construction of a double track, the statute of five years and not the statute of fifteen years applies. *Kentucky Statutes*, secs. 2505, 2515; *Troy v. Cheshire R. R. Co.*, 23 N. H., 83; *Elizabethtown, &c. R. R. Co. v. Combs*, 10 Bush, 382; *Ferguson v. Covington, &c. R. T. & B. Co.*, 22 Rep., 371; *L. & N. R. R. Co. v. Orr*, 91 Ky., 109; *Cosby, &c. v. Owensboro, &c. R. R. Co.*, 10 Bush, 288; *Roulston, &c. v. C. & O. Ry. Co.*, 21 Rep., 1507; *Strickler v. Midland Ry. Co.*, 25 N. E. Rep., 455.

6. There is no evidence tending to show that a double track has caused any greater injury than a single track would have caused, and for that reason the peremptory instruction was proper.

SIMRALL & GALVIN, FOR APPELLEES ON PETITION FOR REHEARING.

POINTS AND AUTHORITIES.

1. This case is in every respect like the case of *Roulstone v. the C. & O. Ry. Co.* and the *C. & C. E. R. R. and T. & B. Co.*, decided December 8, 1899, by Judge White and reported in 54 S. W. R., 2.

2. Presumption of legal authority of appellees to operate their railroad. *Higdon v. Higdon*, 6 J. J. Marshall, 51; *Township of Pembroke v. Canada Central R. R.*, 3 Ontario Rep., 504; 14 Am.

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and Eng. Ry. Cases, 117; Uline v. N. Y. C. R. R. Co., 101 N. Y., 98; Elliott on Railroads, sec. 1701.

3. Five years limitation applies, and not fifteen years. L. & N. R. R. Co. v. Orr, 91 Ky., 109; Stickley v. R. R., 93 Ky., 328; Onions v. C. & O. Ry., 53 S. W., 8; Roulstone v. C. & O. Ry. Co., 54 S. W., 2; Sec. 2515, Kentucky Statutes

4. All damages from lawful construction and prudent operation of railroad can be immediately established and must be recovered in one action. Elliott on Railroads, sec. 1004; E. & P. Ry. Co. v. Combs, 10 Bush, 362; J., M. & I. R. R. v. Esterle, 13 Bush, 667; L. & N. R. R. v. Zachritz, 13 Ky. Law Rep., 141; M. & B. S. R. R. v. Ingram, 16 Ky. Law Rep., 853; L. & N. R. R. v. Orr, 91 Ky., 109; Stickley v. C. & O. Ry. Co., 93 Ky., 328; C. & O. Ry. Co. v. Kleimeier, 49 S. W., 484.

5. Railroad, lawfully operated in street, is not an additional burden which, *per se*, vests in abutting owners right of action. Fulton v. Short Route Transfer Co., 85 Ky., 641, and cases cited; Lexington R. R. Co. v. Appelegate, 8 Dana, 289; Kentucky & Indiana Bridge Co. v. Krieger, 93 Ky., 247.

6. When limitations once begin to run, subsequent disabilities do not stop the running thereof. Henderson v. Bonar, 11 Ky. Law Rep., 219; Ray v. Thurman, 13 Ky. Law Rep., 3; Shuffitt v. Shuffitt, 9 Ky. Law Rep., 207.

7. There can be no recovery for negligent or imprudent operation without allegation and proof thereof. Roulstone v. C. & O. Ry. Co., 54 Ky Law Rep., 2.

COURTLAND PRENTICE CHENAULT, FOR APPELLEE, C. & O. RY. Co.

The right to recover is not now affected by any question of authority. He can sue for damages for permanent injury if the street is used by authority. He can sue if it is without. The criterion of recovery is the same—permanent injury—destruction of so much of his right to enjoy his property.

Let us ask appellant a few questions:

1. What was the nature of your injury as set forth in this action? The answer is: That it was the blowing of whistles, the rumbling of the cars, the ringing of bells, the escape and exhaust of steam, etc., in such a manner as to make the property uninhabitable and unsalable.

2. When did this injury occur? The answer is: It has existed for a great length of time and I am only suing for five years back, and I expect to wait three or four more years and sue again.

3. What was and is the cause of these injuries? The answer is: The construction and operation of the railroad.

4. When was it constructed? Answer: In 1889.

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This being true, the original cause of action was the construction and operation of the road in 1889, and the railroad being a permanent structure "all damages" (as said by Judge Pryor in the Orr Case) can be ascertained and determined when the road is constructed and operated. "That all may be recovered in a single action and therefore the statute of limitation begins and runs from the time the action could have been first instituted."

EDWARD W. HINES, FOR APPELLEE, L. & N. R. R. Co.

H. W. BRUCE, WALKER D. HINES, AND J. W. BRYAN, OF COUNSEL.

POINTS AND CITATIONS.

1. The statute of five years applies to an action to recover damages for injury to abutting property from the construction of a railroad in a street, though the railroad may have been constructed without legislative or municipal authority. *Ferguson v. Covington, &c. R., T. & B. Co.*, 57 S. W., 460.

2. A railroad being a permanent structure, an abutting property owner's right of action for the injury to his property from the construction of a railroad in a street accrues as soon as the road is completed and put in operation, and is barred after five years from that time. *Ferguson v. Covington, &c. R., T. & B. Co.*, 57 S. W., 460; *Troy v. Cheshire R. R. Co.*, 23 N. H., 83; *L. & N. R. R. Co. v. Orr*, 91 Ky., 109; *Elizabethtown, &c. R. R. Co. v. Combs*, 10 Bush, 382; *Chicago, &c. R. R. Co. v. McAuley*, 121 Ill., 160; *Cosby, &c. v. Owensboro, &c. R. R. Co.*, 10 Bush, 288; *Roulstone, &c. v. C. & O. Ry. Co.*, 21 Ky. Law Rep., 1507; *I. Wood on Limitations; Watts v. Norfolk & Western R. R. Co. (W. Va.)*, 23 L. R. A., 674.

OPINION OF THE COURT BY JUDGE PAYNTER—REVERSING.

The former opinion of this court, delivered herein by Judge Hobson, is as follows:

"Frank A. Klosterman died on February 10, 1892, the owner of certain real estate in Covington, Kentucky. Appellants are his widow and children, six of the latter being infants. They filed this suit December 5, 1895, against the Chesapeake & Ohio Railway Company, the Covington & Cincinnati Elevated Railroad & Transfer & Bridge Company, and the Louisville & Nashville Railroad Company, to

recover damages in the sum of \$7,000 for alleged injuries to the real estate received by them from the decedent; the widow being executrix of his will, and guardian of his children, and as such joined also in the suit. Issue was joined upon the petition, and on final hearing the court gave the jury a peremptory instruction to find for the appellees.

"Appellants' property is situated at the corner of Lewis and Craig streets. It has on it two brick houses. One is a three-story brick building, situated on the corner, and fronting on both streets. The first story is used as a store-room for mercantile purposes; the second and third, as a residence. The other is a two-story dwelling fronting on Craig street. There is a small area or yard between the two houses. The railroad tracks complained of run diagonally across Craig and Lewis streets at their intersection. The nearest rail is six and one half feet from the gutter curb. Inside of the gutter curb is a sidewalk six feet wide. Both the buildings extend out to the sidewalk, so that at the corner the three-story brick house is only about fourteen feet from the nearest rail of the railroad track, or about eleven and one half feet from the side of the cars when passing. Craig and Lewis streets are each thirty feet wide, including the sidewalk on either side. The railroad at this point is a double track, and is used almost constantly day and night. Before the railroad was built, the property rented for forty-two dollars a month. Now it brings scarcely enough to pay taxes and insurance. The trains operated are many of them heavy freights, which jar and shake the houses to such an extent as to alarm the occupants and wake them at night. A large quantity of cinders and smoke is thrown into and upon the property sometimes filling the front rooms with smoke, and to such an extent that it is impracticable to keep the front

windows open at all. Large quantities of cinders fall upon the roof and yard, burning the paint off the roof, causing it to rot, and unfitting the yard for such uses as the yard of a residence is designed for. The wall of the two-story building is settled. The noise, vibration and discomfort from smoke and cinders are such that only an undesirable class of tenants will rent the property for a residence, and the storeroom is not desirable for a business place. The tracks take up substantially the intersection of the streets, with the exception of six feet on each side, so as in a great degree to interfere with the ingress or egress of wagons and teams, from the fact that trains are passing so often day and night. There is no doubt, under the evidence, that the property is desirably located, and was valuable before the construction of the railroad, and by reason of its construction has been largely uniltted for the purposes for which it was intended, and greatly depreciated in value. The railroad was constructed precisely as it is now in the year 1889, and, the action not having been filed within five years thereafter, the appellees interpose the plea of limitation, and it was on this ground that the court below gave the jury a peremptory instruction to find for appellees.

"In *Railroad Co. v. Orr*, 91 Ky., 109, 12 R., 756, 15 S. W., 8, this court held that a railroad must be regarded as a permanent structure, and, when its construction in the streets of a city is authorized by legislative and municipal authority, all damages naturally resulting from the proper operation of the road can then be ascertained and determined, and the cause of action therefor is barred by limitation after five years from the time the action might first have been instituted. This case has been followed in so many subsequent causes that the question is not now

an open one, but we are not inclined to extend the rule beyond the limits thus laid down, or to apply it to a case where the construction of the railroad in the street is not authorized by legislative and municipal authority. As has been held by this court in several cases, and is recognized in section 242 of our present Constitution, the injury to property in cases of this character is substantially a taking of private property for public use, and, where this taking has not been done under proper authority of law, it should stand, as to limitation, on the same plane as any other taking of real estate. The structure being permanent, the action is not for a trespass upon the property, in which damages within the preceding five years may be recovered; but the question to be determined is, what will be a fair compensation to the owner of the property for the depreciation of the value of his property by the servitude that is thus placed upon it? When the construction of the railroad is authorized by law, all persons must take notice of this; and there are sound reasons of public policy for not extending the bar of limitation to those cases where the construction is not by authority of law, and the citizen can not well understand his rights. It remains therefore, to determine whether the tracks in question were constructed under proper legislative and municipal authority.

"On August 27, 1851, the council of the city of Covington granted to the Covington & Lexington Railroad permission to lay its road in Washington street. The Covington & Lexington Railroad was afterwards succeeded by the Kentucky Central Railroad, and on October 22, 1885, the city council granted to it, its successors or assigns, permission to extend its track from its terminus to a point on or near

the Ohio river, and 'the right of way for a single track over such streets and alleys' as might be best for said company to use. This grant was, in terms, limited to 'the right of way for a single track.' On December 17, 1887, the Kentucky Central Railroad sold and assigned to the Covington & Cincinnati Elevated Railroad & Transfer & Bridge Company all of its rights, privileges and franchises under and by virtue of these ordinances, and it is insisted that it was justified in constructing the double track in controversy under this authority. But the original ordinance made in 1851 granted a right of way only on Washington street, and the ordinance of October 22, 1885, in express words, granted only a right of way for a single track. Where the authority is expressly limited to a single track, it can not by construction be enlarged, for this would be to violate the plain terms of the instrument. Unless, therefore, there was some other authority for building this double track, the case does not fall within the rule laid down in *Railroad Co. v. Orr*, above referred to.

"Appellees also rely on certain provisions of the charter of the bridge company, and certain sections of the municipal authorities of Covington. These will now be considered: The bridge company was incorporated by an act approved April 4, 1884, under the name of the Covington & Cincinnati Pier Bridge Company. By an act approved February 9, 1886, the name of the corporation was changed to the Covington & Cincinnati Elevated Railroad & Transfer & Bridge Company. This act also contains the following provision (1 Acts 1885-6, pp. 340, 343): 'Said corporation is hereby authorized and empowered to construct, maintain and operate railroad tracks with necessary turnouts and sidings upon the said bridge and the approach thereto.' Section 3. 'The said corporation shall also have power to

construct a railway track with necessary turnouts and sidings upon, over, along or across any public streets, roads, alleys, avenues or through or over any blocks of ground between such streets for the purpose of making connection with the depots or railway tracks of any railroad in the city of Covington within such territorial limits as the city council of said city shall prescribe.' Section 4. 'The said company shall construct and maintain tracks connecting its bridge with the Kentucky Central Railroad in such manner as to enable other railroads to connect their lines of railway with said tracks approaching said bridge. Connections made by any other railroad with such connecting tracks shall be so made as to admit other roads to connect therewith; and any railroad now existing or to be hereafter constructed within the city of Covington shall have the right to connect its railway with said connecting tracks and shall have the right to use the same for the purpose of and to cross said bridge with its locomotives and cars, upon the payment of toll and upon the terms in this act expressed.' Section 8. 'The said company shall not have the power to acquire more than one right of way from any depot in Covington to its bridge and shall obtain no permit or privilege from the city council of Covington for such right of way without first having given at least one week's notice of its intention to make application therefor, which notice shall be in writing and be served on the city clerk of said city, and said corporation shall also cause said notice to be published in some newspaper circulating in Covington at least seven days before the making of such application.' Section 10. The corporation was also authorized by section 6 of the charter to acquire, either by purchase or assignment, such right of way as any other company then possessed or held over or across any streets or blocks of

ground in Covington. The only purchase it made was from the Kentucky Central Railroad, as above stated; and, as this was only a right of way for a single track, authority to construct and maintain the double tracks in question must depend upon a compliance on its part with the provisions above quoted from its charter. It was only authorized by the charter to construct its track within such territorial limits as the city council of the city should prescribe. Section 4. It had no power to acquire more than one right of way from any depot to its bridge, and could obtain no permit or privilege from the council without first giving a week's notice by service on the clerk, and publication in a newspaper circulating in the city. Section 10. The record shows that at a meeting of the council on April 22, 1886, the bridge company presented a paper informing the council that it had located the approaches to its bridge from a certain square, running thence northwardly to the Ohio river, and requesting the council to approve the selection; the paper stating that due notice of the application had been given to the city clerk and by publication as required by law. The council thereupon referred the matter to its committee on railroads and bridges, to report, by ordinance or otherwise, when the company presented more specific location of their route. This, so far as the record shows, was never done, and no action was ever taken by the council on the application. The record also shows that at the same meeting of the council, on April 22, 1886, the Kentucky Central Railroad reported to the council its location of its right of way under the ordinance of October 22, 1885, along the route now occupied by the tracks in controversy. The record further shows a prolonged struggle between the city authorities and the railroad companies about their rights of way, and on July 29, 1886, a majority and minor-

ity report were presented in regard to the granting of the right of way to the bridge company, but no action appears to have been taken on either report. After this the Kentucky Central deeded to the bridge company its right of way, and it is hard to escape the conclusion that the bridge company, to avoid the terms sought to be imposed upon it by the city, or for some other reasons, ceased to prosecute its application to the council, and undertook to get along under its purchase from the Kentucky Central. At least, the presumption must be, as it was only authorized to acquire one right of way, and it did not follow up its application to the council, that this application was abandoned. The purpose of requiring notice to be given of the application was that those interested might resist it before the council, and, when this resistance was made with such effect that no action was taken on the application, the only reasonable conclusion is that the corporation made some other arrangement. It is also shown in the record that on December 22, 1886, an ordinance was passed allowing the Covington Short Route & Transfer Company to build a line from Licking river to the Kentucky Central track, and that in the year 1889 several ordinances were passed requiring the erection of safety gates and the keeping of flagmen at different points along the tracks in controversy. It is contended for appellants that the council, in doing this, only protected the people of the city, and that such ordinances were not grants of right of way, but only police regulations to prevent the trains from running over people. However this may be, we do not think a grant by implication or acquiescence could be properly made by the city council under section 10 of the charter above quoted, for it contemplates that the persons interested shall have notice of the application, and an opportunity

to resist it. To allow a grant to arise from the acquiescence of the council, without notice to those interested, as provided by the statute, would be to defeat its entire purpose.

"We are therefore of opinion that the construction and operation of the double tracks in front of appellants' property was not under regular legislative and municipal authority. While there was authority to construct and operate a single track, a double track, running necessarily so close to the property, was a much more grievous burden; and we do not think the statute of limitation should bar any part of the injury done, for the reason that it is an entirety, and not separable. It would mean that after five years the city authorities and the persons interested, having acquiesced in the construction of the railroad, can not enjoin its operation or require its removal. Appellees, after the expenditures made by them, must be allowed to maintain and operate their road, but if, in so doing, they take the property of appellants, they must make them a fair compensation for the injury done. The road can not now be treated as an illegal structure, or its operation as a nuisance. All we hold is that limitation of five years does not protect appellees from liability for injury done appellants, as their road was not constructed under proper municipal authority."

The opinion so well states the facts in the case, the various legislative enactments, the proceedings of the common council of the city of Covington, and the conclusion as to the application of the doctrine of the Orr case, that it is incorporated in this opinion. The court recedes only from that part of the opinion where it is said, "We do not think the statute of limitation should bar any part of the injury done, for the reason that it is an entirety, and not

separable." Under the doctrine of the Orr case, the five-year statute of limitation would have barred the appellants' cause of action, had the appellees constructed only a single track, because it was done under legislative and municipal authority. The appellees did not have municipal authority to construct the additional track. The mere fact that it was constructed at the same time that the authorized one was could not make it a lawfully constructed track. It was as much an additional servitude upon the street, and injury to the property of appellants, as it would have been, had it been constructed anterior or subsequent to the construction of the authorized track. The effect upon the rights of the appellants was just the same whether the authorized track was constructed prior to, at the same time, or subsequent to the construction of the authorized one. The time of the construction could not affect in any way the application of the statute of limitations to the rights of appellants. When the authorized track was constructed, under the Orr case, the five-year statute of limitation began to run. When the unauthorized one was constructed, and damaged the property of the appellants, it was an unlawful taking of their property, and the fifteen-year statute of limitation applies. As the appellee had the right to maintain one track under legislative and municipal authority, did it forfeit the right to have the five-year statute of limitation apply to appellants' cause of action for injury and damages resulting from its prudent operation? Upon reconsideration, we have concluded that it has not lost it. Its unauthorized act could not change the application of the law of limitation to a cause of action existing independent of such act. It could no more do so, than the doing of the lawful act could change the application of another statute of limitation to the cause of action growing out of the unau-

thorized act. The construction of two tracks created an additional servitude upon the narrow street, and the operation of trains over both of them necessarily added to the damages to appellants' property. While the construction and operation of the two tracks makes it more difficult to determine the damage resulting to the appellants, than it would if only one had been constructed and operated, still that difficulty, which has been created by appellees, should not be interposed as a barrier to appellants' right to have redress for their wrongs. The damage for which they are entitled to recover from appellees is for constructing and maintaining two tracks instead of one. Whatever damages the appellants sustained by reason of the construction and operation of two tracks, which they would not have sustained by the construction and prudent operation of one track, is the amount of damages appellants are entitled to recover. This we believe to be the correct rule for the measurement of the damages they have sustained, and for which their right to recover is not barred by the statute of limitation.

The judgment is reversed for proceedings consistent with this opinion.

Judge O'Rear dissenting:

This action was brought to recover damages alleged to have resulted from the operation of railroad trains over appellee's tracks at the intersection of Lewis and Craig streets, in Covington, Ky. The double tracks of appellee's road pass diagonally across the intersection of Lewis and Craig streets, and over these two streets all railroad trains of appellee's road moving between Covington, Ky., and Cincinnati, Ohio, pass. Appellants' property is situated at the southeast corner of Lewis and Craig streets, fronting thirty-five feet on Lewis street, and extending back seventy-

five feet on Craig street. Upon this lot is a three-story brick house at the corner, and a two-story brick house on the rear of the lot, fronting on Craig street. These tracks were constructed across the intersection of Lewis and Craig streets in the year 1889, since when they have been constantly used in substantially the same condition as they were when first built. At the time of their construction the property involved in this litigation was owned by Frank Klosterman, the husband of one of the appellants, and the father of the others. He died February 10, 1892, and this suit was brought December 5, 1895, by his widow, as executrix, and by his devisees, for injuries to the property arising from the operation of trains on and over said tracks; that is, from the noise, smoke, cinders, and vibrations arising from the operation of the cars. The petition does not allege that appellee's operation of its railroad trains was negligent or unusual, or other than the usual and customary service. Nor does the petition proceed upon the ground that by the construction of appellee's railroad tracks, and the operation of its trains, there has been an interference with appellants' right of egress and ingress from and to their said property. It is the contention of appellants, as set out in this petition, and made here in argument, that appellee's occupancy of the street in question, to the extent of one of its tracks, was without legislative or municipal authority, and it was therefore a continuing nuisance for appellee to operate on such tracks its railroad trains and locomotives. It becomes important, therefore, to determine whether appellee's occupation of the streets in question by its double track of railroad was or has become authorized. If it was, this action is confessedly barred, under the principles announced in *Railroad Co. v. Orr*, 91 Ky., 114, 12 R., 756, 15 S. W., 8. The tracks were built by appellee, the

Covington & Cincinnati Elevated Railroad & Transfer & Bridge Company, hereinafter called the "Bridge Company." This company was incorporated by an act of the Legislature approved February 9, 1886. Prior thereto the Kentucky Central Railroad Company had acquired certain corporate rights and franchises, including that of operating and maintaining a line of railroad into the city of Covington, and on to the Ohio river. The bridge company was authorized to construct a railway and highway bridge across the Ohio river between the cities of Cincinnati and Covington, and to operate railroad trains thereon. It was authorized to construct approaches to the bridge on the Covington side, and to build and maintain connection with the railroad tracks of such other roads as might then be in Covington, or might thereafter be constructed to Covington. At that time, so far as the record discloses, there was but one road in Covington, to-wit, the Kentucky Central. The eighth section of the act of incorporation is as follows: "The said company shall construct and maintain tracks connecting its bridge with the Kentucky Central Railroad in such manner as to enable other railroads to connect these lines of railway with said tracks approaching said bridge. Connections made by any other railroad with such connecting tracks shall be so made as to permit other railroads to connect therewith; and any railroad now existing or to be hereafter constructed within the city of Covington shall have the right to connect its railway with said connecting tracks, and shall have the right to use the same for the purpose of and to cross said bridge with its locomotives and cars upon the payment of tolls and upon the terms in this act expressed" Section 10 is as follows: "The said company shall not have the power to acquire more than one right of way from any depot in Covington to its bridge, and shall obtain no per-

mit or privilege from the city council of Covington for such right of way without first having given at least one week's notice of its intention to make application therefor, which notice shall be in writing, and be served on the city clerk of said city, and said corporation shall also cause said notice to be published in some newspaper circulating in Covington at least seven days before the making of such application, but nothing herein shall be construed to prevent said company from acquiring a right of way by assignment as provided in section 6 hereof." Under this charter, appellee bridge company did construct the bridge contemplated by the act, and did build approaches thereto on the Kentucky side of the river, and did connect its tracks with the tracks of the Kentucky Central Railroad Company. The Maysville & Big Sandy Railroad Company, now operated and controlled by the Chesapeake & Ohio Railway Company, had constructed a railroad into the city of Covington; and the track was built on the same roadway, and parallel to the other track connecting this road with the bridge company's road. In other words, the bridge company has built tracks from its bridge connecting it over one roadway with two different railroads operating in Covington, Ky., which were, under the charter of appellee bridge company, entitled to transfer privileges over said bridge into Cincinnati.

For appellants it is argued that the authority to appellee to construct a double track road is not shown in this case, because there was not a compliance with section 10 of appellee bridge company's charter, above quoted, in which it was required to give notice in writing, to be served on the city clerk and published in some newspaper circulated in Covington for at least seven days before the making of such application for roadway. Whether such notice was given is not shown. It is not argued or shown that a spe-

cific grant of roadway to the bridge company was made by the city council. It seems from the record that the bridge company's connecting tracks were in fact built by the Chesapeake & Ohio Railway Company, and are operated by it, under the management and charter of the bridge company. The record discloses abundant instances, as early as 1889, when the Chesapeake & Ohio Railway Company was building, or shortly after it had completed, the line of the road in question, that the city council was negotiating with that company as to the manner of making certain grades on certain of the streets over which it crossed in the construction of such approach to the bridge, and wherein the railroad company was required to, and did, agree to bear the expenses of regrading certain parts of such streets, and of constructing sewers, etc., and of maintaining gates across certain streets, including Lewis and Craig streets crossing. Was this equivalent to a grant by the municipal corporation of a right of way across the street in question? In this State the Legislature might have authorized the construction of a railroad across or along the streets of a town or city without the consent of the latter. *Railroad Co. v. Orr*, *supra*. The legislative authority to appellee to construct the railroad in question was undoubtedly conferred. The only thing remaining was the assent of the municipal corporation of the city of Covington. The manner of giving this assent (that is, whether it should be by deed or by ordinance) is not stipulated. That the municipality had notice of appellee's purpose to construct the railroad in question, and as now operated, is evident. That it raised some objections to the exercise of this purpose in certain particulars, which were finally adjusted to its satisfaction, is also shown. That the railroad company, evidently relying upon these facts, in connection with the charter of the

bridge company, built the tracks upon the route in litigation, with the knowledge and assent of the city, is apparent. Under these circumstances, would the city be permitted to say to the railroad company that it had not complied with the prerequisites named in the statute, and therefore it must leave the streets? We think not. It would be held estopped by its conduct, and appellee's reliance thereon, to the extent that it constructed an expensive railway over the streets in question. Appellee having the right to construct its "railroad tracks" over such streets as the city might permit, and the city of Covington having acquiesced in the construction of the tracks, for the purposes and to the extent authorized by appellee's charter, it must be held to be bound by its conduct in the premises as fully and to every extent as if such authority had been granted by ordinance duly passed. There is no good reason why the municipality should not be held to the same standard of honesty in such matters, when applying to it an estoppel, as other persons would be. In *Kneeland v. Gilman*, 24 Wis., 39, cited and adopted as basis of text in *Herm. Estop.*, 1363, it was said: "But of late years, much more than formerly, the doctrine of estoppel, most wholesome and just in its operation when properly applied, has been extended to these municipal corporations, so as to bind and conclude them by their own acts and acquiescence, and the act and acquiescence of their officers, whenever an estoppel would exist in the case of natural persons. It is now well settled that, as to matters within the scope of their powers and the powers of their officers, such corporations may be estopped upon the same principles and under the same circumstances as natural persons."

We conclude, therefore, that appellees have acquired the right to build the double-track road at the places now oo-

occupied, and in question in this suit. It therefore follows that applying the doctrine of the cases of Railroad Co. v. Orr, *supra*, and Roulston v. Railroad Co. (21 R., 7) 54 S. W., 2, the statutory bar of five years pleaded by appellees in this case against appellants' right of recovery was applicable, and that the circuit court rightfully gave a peremptory instruction based thereon. The majority opinion proceeds upon the theory that although appellees had a perfect right to build a single-track railway over the route in question, yet by building an additional track they have become liable for the damages resulting from all operation of trains over it—the additional track—but not for the smoke, noise, etc., caused by the operation of the trains on the first track. The damages for which appellants sue are not really due to the existence of the two tracks, but the existence of noise, smoke, cinders and jarring caused by the trains. These conditions would exist just the same whether these trains passed over one or two tracks, it not being shown in the record that both tracks were ever used at this point at the same moment.

Whole court sitting.

Judges Burnam and Du Relle concur with Judge O'Rear.

Petition for rehearing by appellee overruled.

CASE 49—PROCEEDING BY W. E. BATES AND OTHERS AGAINST A. G. CRUMBAUGH AND OTHERS, CONTESTING THE ELECTION FOR CITY OFFICES.—DEC. 17.

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114	447
1125	776

APPEAL FROM SCOTT CIRCUIT COURT.

FROM JUDGMENT DISMISSING THE PETITIONS, CONTESTANTS APPEAL.
REVERSED EXCEPT AS TO CONTESTANT, CLARK, AND CONTESTEE, KELLY, AND AS TO THEM AFFIRMED.

ELECTIONS—CONTEST—BALLOTS—IRREGULAR MARKS—ELECTION OFFICIALS—DUTIES—RETURNS—FAILURE TO SIGN—CLERK—EVIDENCE.

- Held: 1. Election ballots, with stencil marks appearing in the circle under the device of the regular Republican ticket, and also in the circle under the device of the Independent Republican candidate for one of the offices, should not have been rejected on the count.
2. Where the clerk of election fails to sign his name on the back of the ballot, as required by the statute, whether by design or through inadvertence, the ballots should not be rejected merely on account of such failure.
3. A ballot voted in the circle under the Republican device and a cross mark made in the blank under the name of one of the Democratic candidates should be counted for the Republicans except as to such one office, as to which it should be counted for the Democratic candidate.
4. Ballots marked with a blurred figure, or with irregular black marks, in the circle under the device of one party, should be counted for such party.
5. Ballots bearing devices for three sets of candidates, marked in the circles under two of the devices, should be rejected.
6. A ballot marked under the Republican device, but which was torn on the side, should be counted for the Republican candidates, for, having been counted by the officers, the presumption must be indulged that the tearing occurred subsequent to its consideration by them, upon the theory that the officers did their duty, even if the court on appeal were of opinion that such a tear as the one in question vitiated the ballot.
7. The election returns from one precinct were signed only by the clerk of election representing the Democratic party, which was

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in the minority. The officers representing the other party appeared the following day, and demanded the right to sign, and the balance of the Democratic officials admitted the correctness of the vote at the time it was taken. The ballots confirmed the accuracy of the count, and gave no evidence of having been tampered with. HELD, that the failure of the officials to sign the return, as required by statute, did not invalidate the vote.

8. A ballot should not be rejected because of ink blots on the back thereof, there being nothing to indicate that they were put there by the voter to distinguish the ballot.
9. On the contest of an election the court will apply the same rules of evidence and draw the same deductions from the facts as would apply and be drawn in an ordinary contest over property rights.
10. Ballots signed by the clerk of election, not with his own name. "George D. Lancaster," but with the words "Hotel Lancaster," will not be rejected for that reason alone.
11. Where ballots were marked unmistakably in the circle under the Republican device with the same kind of a stencil used in marking all the ballots that were counted in the precinct in question and in two other precincts, and the whole appearance of the ballots and the great weight of testimony tend to show that they were voted for the Republican ticket, the fact that there was a shadowy blur, together with marks, in the circle under the Democratic device, apparently fraudulently made by a rubber cross attached to a finger or thumb, will not prevent the ballots from being counted for the Republican candidates.

J. R. MORTON, J. B. FINNELL AND L. F. SINCLAIR, FOR APPELLANTS.

JOHN R. ALLEN AND W. S. KELLY, FOR APPELLEES.

(No briefs.)

OPINION OF THE COURT BY JUDGE DURELLE—REVERSING.

At the election held November 5, 1901, in Georgetown, Scott county, there was a full Democratic ticket upon the ballot, under the emblem of the chicken cock, for all the county and city offices to be filled in that county and city at that election. There was a full Republican ticket for the same offices, except for the office of State senator and county school superintendent, under the device of the log cabin;

and there was an independent candidate for police judge, under his individual device of a picture of Abraham Lincoln. There was also a submission to the voters of a proposal to incur an indebtedness of not exceeding \$25,000 for the purpose of building a sewerage system in Georgetown. The Democratic candidates for county offices appear to have won by a comfortable majority, but the vote in the city for city offices and for magistrate of the city district was close. The county board of the election commissioners, after its canvass of the returns, issued certificates of election to A. L. Ferguson as mayor, H. S. Rhoton, as police judge, W. S. Kelley, as city attorney, Z. D. Lusby, as chief of police, D. A. Adams, as city clerk, Geo. C. Wolfe, as city treasurer, J. T. Scott, as city assessor, M. H. Haggard, as magistrate and Jas. Y. Kelley, B. A. Lair, Chas. O'Neil, J. W. Thacker, A. G. Crumbaugh, J. T. Brooks, J. A. Hamon and A. B. Barkley as councilmen, who were the Democratic candidates for the various offices named. The Republican candidates instituted contests for the various offices in the Scott circuit court. The cases were not consolidated, but were heard together, under an agreement that the depositions taken and used in one case should be considered as evidence in all the cases. On the hearing of the cases by the circuit court, judgments were rendered dismissing contestants' petitions.

There were three precincts in the city of Georgetown—the engine house, the city school, and the courthouse precincts. Upon the hearing of the contests the ballots preserved and produced from the city school precinct were rejected entirely on account of failure of the officers to properly certify the returns. It appears from the record that in all three of the precincts there was a failure to certify

the returns in the voting place immediately after the election. In the city school precinct the returns were made out on the inside of the cover of the stub book, and the Democratic clerk affixed his signature. The other officers failed to affix their signatures, as appears from the testimony, purely through oversight; and the two Republican officers appeared before the county clerk, and demanded the right to affix their signatures, on the day after the election, and subsequently appeared before the county board of election commissioners, and demanded the right to sign the certificate. The Democratic judge did not appear before the clerk or before the board of commissioners, but seems to have stated on the outside that he was willing to sign the certificate if it was legal to do so, and in his testimony stated that he was willing to do so if he could be assured that the figures were the same as those made by the officers in the voting place. In the courthouse precinct, which gave a Democratic majority on the face of the returns, no returns were made out in the stub book until after the delivery of the ballot boxes to the county court clerk. The evidence indicates that the county court clerk called the attention of the officers to the omission, and there is some evidence showing that this was done on the suggestion of the clerk of election at the city school precinct. In the engine-house precinct, where the returns showed a majority for the Democratic candidates varying from 23 to 60-odd, the returns were not signed until the day after the election, owing to a dispute as to whether certain ballots not indorsed by the clerk of election with his signature should be counted. The ballot boxes, returns and ballots were all produced before the circuit court upon the hearing of the contest. Taking the count there made as the basis, we find that in the engine-house precinct there were uncontested

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ballots counted for the various officers as follows: Democratic Ticket: Ferguson, 183; Rhoton, 179; Kelley, 178; Lusby, 197; Adams, 158; Wolfe, 175; Scott, 170; Haggard, 188; Kelley, 188; Lair, 174; O'Neil, 170; Thacker, 182; Crumbaugh, 173; Brooks, 167; Hamon, 165; Barkley, 171. Republican Ticket: Keller, 115; Bristow, 119; Finnell, 118; Ashurst, 104; Lemon, 135; Bradley, 118; Glass, 122; Johnson, 106; Bates, 120; Bradley, 126; Braden, 117; Clark, 102; Caden, 108; Jenkins, 125; Nunnally, 126; Offutt, 120. There were three ballots which were not counted by the circuit judge because stencil marks appeared in the circle under the device of the regular Republican ticket and also in the circle under the device of the Independent Republican candidate for police judge. Under the doctrine laid down in the recently decided cases of *Herndon v. Farmer*, 114, Ky., —, (24 R., 1045) 70 S. W., 632, and *little v. Hall* 114 Ky., —, (24 R., 1060) 70 S. W., 612, these ballots should have been counted. There appear five ballots which were rejected by the election officers because not signed by the clerk. Both parties to these records have argued in support of the proposition that, where the clerk of election fails to sign his name upon the back of the ballot, as required by the statutes, whether by design or through inadvertence, the ballots should not be rejected merely on account of such failure. The trial court so decided, and, in our opinion, correctly. The principle should be borne in mind that, as to duties required of the voter himself and duties required of election officers, a different rule prevails, and that when officers of election, by neglect or fraud, fail to perform their duty in a matter over which the voter has no control, the inclination of the courts is always that the voter shall not suffer by reason of the negligence of the officers; and, while the provision may be regarded as mandatory with regard

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to the officer, and his failure may subject him to punishment, it shall not disfranchise the voter who is not guilty of the violation. *McCrary, Elect.*, sections 225, 283; *Payne, Elect.*, section 528. In *Moyer v. Van De Vanter* (Wash.), 41 Pac., 60 (29 L. R. A., 670, 50 Am. St. Rep., 900), a statute providing that official ballots lacking the indorsement of an inspector or one of the judges should not be counted was held unconstitutional on the ground that the mere failure of the officer to perform a directory duty should not disfranchise the voter. In *Parvin v. Wimberg* (Ind. Sup.), 30 N. E. 790 (15 L. R. A., 775, 30 Am. St. Rep., 254), an indorsement by the clerk in the wrong place was held not to vitiate the ballot. See, also, *Allen v. Glynn* (Colo. Sup.), 29 Pac., 670 (15 L. R. A., 743, 31 Am. St. Rep., 304). And the principle here applied seems to have been the one followed in *Clark v. McKenzie*, 7 Bush, 523. These five ballots should, therefore, be counted, unless they are open to some other objection. Three of them were marked under the Republican device, and should have been counted for all the Republican candidates, except one, which was scratched in favor of Rhoton. One was voted for Kelley, Bristow, Finnell, Ashurst and Johnson in the squares opposite their names, and for no other candidate. One was not voted in any of the races in contest; and one was voted in the circle under the Republican device, and a cross mark made in the blank under the name of Brooks, a Democratic candidate for the council. Clearly, this last-mentioned ballot should be counted for the Republican candidates, except in that race. There is nothing to show that this mark was intended by the voter as a distinguishing mark, and we are inclined to the belief, from the position of the mark with reference to the small square, that it was intended to be a vote for Brooks. It follows, therefore, that it must be

counted for him. Six other ballots which had been counted by the officers of election were considered by the trial court, three of which had irregular black marks in the circle under the Democratic device, and were properly counted for the Democratic ticket, under the ruling in *Houston v. Steele*, 98 Ky., 610, 17 R., 1149, 34 S. W., 6. One marked under both devices was properly rejected. One marked with a blurred figure under the Republican device should be counted for the Republican ticket, and one which was marked under the Republican device, but which was torn on the side, should be counted for the Republican candidates; for, having been counted by the officers, the presumption must be indulged that the tearing occurred subsequent to its consideration by them, upon the theory that the officers did their duty, even if we were of opinion that such a tear as the one in question vitiated the ballot.

Making these changes, we have the following result for the engine-house precinct: Democratic Ticket: Ferguson, 186; Rhoton, 183; Kelley, 181; Lusby, 200; Adams, 161; Wolfe, 178; Scott, 173; Haggard, 191; Kelley, 191; Lair, 177; O'Neil, 173; Thacker, 185; Crumbaugh, 176; Brooks, 171; Hamon, 168; Barkley, 174. Republican Ticket: Keller, 125; Bristow, 125; Finnell, 128; Ashurst, 114; Lemon, 144, Bradley, 127; Glass, 131; Johnson, 116; Bates, 129; Bradley, 135; Braden, 126; Clark, 111; Caden, 117; Jenkins, 133; Nunnally, 135; Offutt, 129.

In the city school precinct the proceedings seem to have been conducted with perfect accord between the officers, and with exemplary care in the ascertainment of the result, and in complying with all the requirements of the statute, except in the one matter of signing the returns, which were, as stated, signed only by the clerk of the election. It is unnecessary to consider whether it was the duty of the

county court clerk to permit the election officers, who had forgotten to sign the returns from this precinct, to sign them after they had been placed in his custody, as he did in the courthouse precinct. It is sufficient to say that there seems to be no substantial attack upon the accuracy of the count, of the correctness of the returns, which were made and signed by the Democratic clerk, and which are further verified by the tally sheets which were returned with the ballots, and substantially agree with the tally made by the circuit judge. A third of the city of Georgetown is not to be disfranchised by an inadvertent omission on the part of the election officers. There is some conflict of opinion upon this question. In some cases it has been held that the requirement of signatures to the certificate of the count is mandatory, and that a return not thus authenticated can not be received by the officers or in a contest. In *Butler v. Lehman*, 1 Bart. Elect. Cas., 353, such returns were not rejected. The New York assembly held the requirement to be directory merely. *N. Y. Elect. Cas.*, 180. And in *Nevada (Stinson v. Sweeney)*, 17 Nev., 309 (30 Pac., 997), it was held that, where there was no question of the correctness of the return, or the qualifications of the officers or voters, the vote would not be rejected for the lack of a certificate. In *People v. Nordheim*, 99 Ill., 553, the court said that "the offer by the officers to sign the returns after it was discovered that they had omitted to sign them, and after the returns had been sent in to the proper authorities, was sufficient to treat the returns as if they were in fact signed, and they should have been so treated." And see *McCrary, Elect.*, sections 190, 192. In *Moyer v. Van De Vanter*, 41 Pac., 61 (29 L. R. A., 672, 50 Am. St. Rep., 900), the supreme court of Washington said: "There is good ground for recognizing a distinction between the obligations placed upon

the individual voter and those matters which relate to the duties of election officers. Great care should be taken to distinguish between those requirements designed to prevent fraud, and which are necessary to the purity of elections, and those which, while designed for the same purpose, are not essential thereto, or we may overreach the salutary effect sought to be obtained from provisions of the character first mentioned by going so far, in construing as valid and mandatory provisions of the second class, as to open the very door to fraud that was sought to be closed thereby. The individual voter may well be called upon to see that the requirements of the law applying to himself are complied with before casting his ballot; and, if he should willfully or carelessly violate the same, there would be no hardship or injustice in depriving him of his vote; but if, on the other hand, he should, in good faith, comply with the law upon his part, it would be a great hardship were he deprived of his ballot through some fault or mistake of an election officer in failing to comply with a provision of the law over which the voter had not control. It is also a question in which the public has a direct and important interest, for the loss of such vote may have a controlling effect upon a public matter." This principle was distinctly recognized in *Clark v. McKenzie*, 7 Bush, 526. We conclude, therefore, in this case, that, as there is no question of the correctness of the returns which were signed by a clerk representing that party against which the majority appeared, and as the officers representing the other party demanded the right to sign them—the other representative of the minority party at that precinct admitting their correctness at the time they were made—and as the ballots themselves, upon examination, confirm the accuracy of the count by the officers, and there is no suggestion that they

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have been tampered with, this precinct should not be thrown out.

The tally made by the circuit judge shows the vote at this precinct to have been: Democratic Ticket: Ferguson, 105; Rhoton, 110; Kelley, 100; Lusby, 104; Adams, 93; Wolfe, 99; Scott, 98; Haggard, 102; Kelley, 109; Lair, 101; O'Neil, 101; Thacker, 107; Crumbaugh, 104; Brooks, 99; Hamon, 96; Barkley, 104. Republican Ticket: Keller, 199; Bristow, 192; Finnell, 202; Ashurst, 202; Lemon, 209; Bradley, 206; Glass, 205; Johnson, 199; Bates, 205; Bradley, 208; Braden, 193; Clark, 193; Caden, 197; Jenkins, 199; Nunnally, 203; Offutt, 204.

At the courthouse precinct there was some trouble in the count of the ballots. The returns showed 49 ballots questioned or rejected. The evidence shows quite conclusively that 17 of these were rejected by the officers as mutilated ballots, the contention of contestants being that this was fraudulently done by the clerk of election during the count. The evidence shows that 23 of the ballots were not signed on the back by the clerk of election, and that 8 of the rejected ballots were signed by him, not with his own name, "Geo. D. Lancaster," but by the words "Hotel Lancaster." Contestants claim that 48 of the 49 ballots questioned or rejected should be counted for them. There is little doubt of the accuracy of the count of the ballots at this precinct, so far as they were counted. There seems to be no question on either side as to the proper preservation of the ballots which were counted. They were found intact when the ballot box was produced on the hearing of the contest. The tally made by the circuit judge accords with that of the officers, except that he rejected one ballot, apparently because of two ink blots on the back. This ballot, we think, should have been counted for the straight Republican ticket,

as there is nothing to show that these marks were put there by the voter for the purpose of distinguishing his ballot. Taking the circuit judge's tally, we have the vote at this precinct as follows: Democratic Ticket: Ferguson, 147; Rhoton, 146; Kelley, 146; Lusby, 153; Adams, 131; Wolfe, 146; Scott, 143; Haggard, 149; Kelley, 155; Lair, 145; O'Neil, 146; Thacker, 149; Craumbaugh, 152; Brooks, 145; Hamon, 144; Barkley, 151. Republican Ticket: Keller, 100; Bristow, 112; Finnell, 114; Ashurst, 111; Lemon, 128; Bradley, 117; Glass, 111; Johnson, 107; Bates, 108; Bradley, 112; Braden, 110; Clark, 99; Caden, 102; Jenkins, 111; Nunnelly, 111; Offutt, 105. Adding these returns, together with the one ballot improperly rejected by the court, to the votes ascertained in the other two precincts, we have the following result, without in any way considering the 48 rejected ballots which contestants claim should have been counted for them: Democratic Ticket: Ferguson, 438; Rhoton, 439; Kelley, 427; Lusby, 457; Adams, 385; Wolfe, 423; Scott, 414; Haggard, 442; Kelley, 455; Lair, 424; O'Neil, 420; Thacker, 441; Crumbaugh, 432; Brooks, 415; Hamon, 408; Barkley, 429. Republican Ticket: Keller, 434; Bristow, 430; Finnell, 445; Ashurst, 428; Lemon, 482; Bradley, 451; Glass, 448; Johnson, 423; Bates, 443; Bradley, 456; Braden, 430; Clark, 404; Caden, 417; Jenkins, 444; Nunnelly, 450; Offutt, 439. This would give the election to the contestants Finnell, Lemon, Bradley, Glass, and to five of the Republican candidates for the council.

The difficulty arises when we come to consider the votes which were not counted by the officers. Upon the hearing there were found in the box only 19 of the 23 unsigned ballots, 16 of the so-called "mutilated ballots," and 6 of the "Hotel Lancaster" ballots. The evidence goes strongly to show that the unsigned ballots and the "Hotel Lancaster"

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ballots are not in the same condition that they were when returned by the officers. Although at the count by the officers at the voting place the 8 "Hotel Lancaster" ballots were counted and tallied as straight Republican ballots, 4 of the 6 ballots which were produced on the hearing are marked in the squares to the right of the names of all of the contestees and in the circle under the Republican device, the other 2 of the 6, which we have before us, being marked only in the circle under the Republican device. As to the 23 unsigned ballots, which were not counted by the officers, there is some conflict of testimony. Some of the persons who were officers and inspectors insist that they were not examined. The others insist that they were examined by all of those present at the count, or at least, that they examined them, and they were all practically straight Republican ballots that there were no straight Democratic ballots, and that upon only a few of them was any scratching done in favor of any Democratic candidate. An examination shows that the unsigned ballots numbered 1, 2, 3, 7, 11, 12, 14, 15 and 19—9 ballots—are marked in the circle under the Republican device and in the square at the right of the names of all the contestants, and in no other place. Ballot No. 6 is marked in the same way, except that it has, in addition, a slight blur, apparently made with an ink finger, in the circle under the Democratic device. Ballot No. 4, while it bears no signature of the election clerk, should be properly classed and considered with the so-called "mutilated ballots." Seven of these unsigned ballots—Nos. 5, 9, 10, 13, 16, 17, and 18—show that some mark has been erased from the circle under the Republican device, and have a cross-mark in the circle under the Democratic device. In 4 of them, notwithstanding the erasure, the outline of the cross-mark in the erasure in the circle

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under the Republican device can still be seen in a strong light. The remaining ballot is marked in the circle under the chicken cock, and, besides some marks in the squares to the right of the two Democratic candidates for county offices, is marked for both Ferguson and Keller, for both Kelley and Bates, for both Thacker and Clark, for both Crumbaugh and Caden, and also for Ashurst and Lemon on the Republican side, and Barkley on the Democratic side. One of the so-called "mutilated ballots"—including the one unsigned by the clerk (being No. 6)—is imperfectly marked with the stencil in the circle under the Republican device, and is marked with a pen with a cross (X) in the circle under the Democratic device. The remaining 16 are all marked unmistakably in the circle under the Republican device, with a stenciled cross (X) having all the appearances of being made by the same stencil, or the same kind of stencil, used in marking all the counted ballots in this and both the other precincts. Nine of them also have a mark in the circle under the Democratic device, just as unmistakably not made by that stencil or by that kind of a stencil. This mark is of a different size and shape, the arms of the cross are of a different thickness, the ink seems to be of a slightly different color, and about each of these marks under the Democratic device is a small white space, and around that a shadowy blur, evidently made by an inky thumb or finger, and plainly showing the lines of the skin. The other 7 of these ballots have, in addition to the cross (X) under the Republican device, a blurred mark in the circle under the Democratic device, not made by a stencil, but apparently made by an inky thumb or finger. Nothing seems to have been done to these so-called mutilated ballots since the count. They are in substantially the same condition that the evidence indicates they were in at the time the count

was made. The whole appearance of the ballots themselves and the great weight of the testimony tend to show that they were voted for the straight Republican ticket by the voters who cast them, and that they were fraudulently marked by a rubber cross (X) attached to a finger or thumb. We do not decide that the clerk of election did this. We know that some one did it. We can not think it was done by the voters. Whoever did it, it must have been done for the purpose of defrauding the Republican candidates of votes which had been rightfully cast for them, and we think the attempted fraud should not be permitted to have effect. Therefore these votes should be counted for the contestants. The evidence is almost equally conclusive that the contestants were improperly deprived of eight votes signed by the clerk "Hotel Lancaster," and that fraud was perpetrated subsequent to the count by the abstraction of two of those ballots from the box, and by the marking of four of them in the squares to the right of contestees' names. This conclusion is strongly supported by the condition of the other ballots which were returned as not counted because not signed by the clerk, and which, despite the evidence of all the officers who claim to have examined them at the count that they were straight, or practically straight, Republican ballots, appear as scratched in favor of contestees, and of no one else. The condition of the ballot box (either key of which will open both locks) and the condition of the linen envelope in which the uncounted ballots were returned (and which, while at one end it was sealed with hot wax and an impression of the county seal, is palpably easy of entrance at the other end) show that access could have been obtained to these ballots; and the condition of the ballots themselves points strongly to the conclusion that access was actually had. The change is

manifest of seven of these ballots from Republican ballots to Democratic ballots. The remaining ballots, which now appear stamped not only in the circle under the Republican device, but in the square to the right of each contestees' name, and nowhere else, are exceedingly suspicious, and are not passed upon, and are not counted for any one. An examination of the ballots themselves shows a very suspicious state of facts, even if there were no other evidence of tampering with the ballots which were returned in the accessible envelope, and if there were no evidence as to how the ballots appeared at the time of the count. The 8 "Hotel Lancaster" ballots were undoubtedly all straight Republican ballots; but as four of them now appear, and as ten of the unsigned ballots now appear, they present a most remarkable variety of scratching. Why a voter should desire to vote the straight Republican ticket in the county, where the Republican ticket had no chance, and should also desire to defeat the candidates of what appears to have been his party in the city, where they had a chance to win, is, to begin with, exceedingly peculiar. And it further appears that the voters who had this peculiar desire stamped in the circle of the device with very varying degrees of pressure and of steadiness of hand, and varied also in the amount of ink taken up on the stencil; but when they came to scratch in favor of the Democratic city candidates every one of them showed a singularly uniform pressure, precision, and care in the amount of ink taken up upon the stencil.

Inasmuch as it would not change the result to count for contestants the unsigned ballots which we find marked in the circle under the Republican device and also in the squares to the right of contestees' names, and as we can not, under the circumstances shown in this case, count them

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for contestees, they are not counted at all. Counting for contestants the 16 so-called "mutilated ballots," the 8 "Hotel Lancaster" ballots, and the 7 ballots showing an erasure in the circle under the Republican device and the stencil in the circle under the Democratic device, the contestants appear to have been elected, with the exception of contestant Clark, and contestee Kelley appears to have been elected to the council. The vote for the entire city will then stand as follows: Democratic Ticket: Ferguson, 438; Rhonton, 439; Kelley, 427; Lusby, 457; Adams, 385; Wolfe, 423; Scott, 414; Haggard, 442; Kelley, 455; Lair, 424; O'Neill, 420; Thacker, 441; Crumbaugh, 432; Brooks, 415; Hamon, 408; Barkley, 429. Republican Ticket: Keller, 465; Bristow, 461; Finnell, 476; Ashurst, 459; Lemon, 513; Bradley, 482; Glass, 479; Johnson, 454; Bates, 474; Bradley, 487; Braden, 461; Clark, 435; Caden, 448; Jenkins, 475; Nunnely, 481; Offutt, 470.

Applying the same rules of evidence, drawing the same deductions from the facts before us, which we would apply and draw in an ordinary case of contest over property rights, as was done in *Tunks v. Vincent* (106 Ky., 829) (24 R., 475) 51 S. W., 622, we are satisfied that we can ascertain the result of these elections as held, counting these contested ballots in the manner indicated, we have no doubt that we thereby establish the will of the voters of Georgetown.

At the hearing a motion was made to dismiss some of the appeals for want of bond. A bond seems to have been given in each case, and no ground for the motion is pointed out by brief or otherwise. The motion is therefore overruled.

For the reasons given, the judgment in each of the cases are reversed, and causes remanded, with directions to enter

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judgments for the appellants, except as to contestant Clark and contestee Kelley, as to whom the judgment is affirmed.

Judge Hobson did not sit in the cases of Finnell v. Kelley and Bates.

CASE 50—ACTION BY H. L. KREMER AGAINST A. BUTTON TO ENFORCE
A LIEN FOR APPORTIONMENT WARRANTS.—DEC. 17.

Button v. Kremer.

APPEAL FROM JEFFERSON CIRCUIT COURT, CHANCERY DIVISION.

JUDGMENT FOR PLAINTIFF AND DEFENDANT APPEALS. REVERSED.

STREET IMPROVEMENT—INTERSECTIONS—PAVING—ASSESSMENT OF COST.

Held: 1. Kentucky Statutes, section 2833, provides that, if the territory to be charged with the cost of constructing a street improvement is bounded on all sides by principal streets, the cost must be apportioned among the lot owners in each one-fourth of the square contiguous to the improvement, and, if the territory contiguous to any public way is not defined into squares by principal streets, the ordinance providing for the improvement must state the depth on both sides "fronting" the improvement, which is to be assessed according to the number of square feet owned by the parties within the depth set out in the ordinance. **HELD**, that such statutes did not provide any mode of assessment for the improvement of a street intersection which was not surrounded by property bounded by streets, nor had any property fronting thereon, and hence the cost thereof must be paid by the city.

LANE & HARRISON, FOR APPELLANT.

POINTS AND AUTHORITIES.

When the territory contiguous to any street improved (in a city of the first class) is not defined into squares by principal streets, the only property liable to assessment for such improvement, is that which fronts the improvement. Such property so fronting the improvement is by the existing law charged with its cost; and neither the council or the court can make

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it a charge against any other property. The only authority of the council is to state the depth of the property "fronting the improvement." Sec. 2833, Kentucky Statutes; Gleason v. Barnett, 20 Ky. Law Rep., 1694; Fid. Trust & Safety Vault Co. v. Voris, 22 Ky. Law Rep., 1875; Broadway Baptist Church v. McAtee, 8 Bush, 516; Preston v. Obst, Man. Opn., Feb. 1875, Reptd. in Burnett's Code, p. 755; Fox v. Middlesborough, 96 Ky., 262; Louisville v. Nevin, 10 Bush, 551; Craycraft v. Selvage, 10 Bush, 696; Caldwell v. Rupert, 10 Bush, 179.

CARROLL & CARROLL, FOR APPELLEE.**POINTS AND AUTHORITIES.**

1. Property is assessable for street improvements when the quarter square or taxing district in which it is located binds upon the improvement. Boone v. Nevin, 15 R., 54.

2. The Legislature in section 2833, Kentucky Statutes, used the language "fronting the improvement" in the sense of "binding upon, abutting or contiguous to the improvement" and for the purpose of fixing a taxing district or territory to be assessed in the same manner and for the same amount per square foot, as if it were defined into squares.

3. The chief object to be attained in assessment for street improvement is equality of burden upon contiguous property.

4. The charter for second class cities especially provides that such cities shall pay the cost of the improvement of intersections of streets and alleys, but such a provision is omitted from the charter of first class cities. Sec. 3096, Kentucky Statutes.

OPINION OF THE COURT BY JUDGE BURNAM—REVERSING.

On the 6th of June, 1898, the general council of the city of Louisville adopted the following ordinance for the original construction of the carriage way of Fourth street from the center line of Brandeis avenue, extended, to the south line of Brandeis avenue, extended:

"Be it ordained by the general council of the city of Louisville: That the carriage way of Fourth street, from the center line of Brandeis avenue extended to the south line of Brandeis avenue extended, shall be thirty-six feet in width, and shall be improved by grading, curbing and paving with vitrified brick, with corner stones and footway crossings across all intersecting streets. Said work shall be

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done in accordance with the plans and specifications on file in the office of the board of public works, and at the cost of owners of ground on the east side of Fourth street from Brandeis avenue to a line 210 feet south and parallel to Brandeis avenue, and extending back to a line 200 feet east of and parallel to Fourth street, and on the west side of Fourth street from an outer line of Brandeis avenue extended, to a line 210 feet south of and parallel to Brandeis avenue extended, and extending back to a line 200 feet west of and parallel to Fourth street. The cost to be equally apportioned among the owners of property according to the number of square feet of ground owned by the parties respectively within the limits above set out, and that all ordinances in conflict herewith be and are hereby repealed. Wm. M. Finley, C. B. C. Sam'l S. Blitz, P. B. C. Chas. C. Martin, C. B. A. Paul C. Barth, P. B. A.

"Approved the 6th of June, 1898. Chas. P. Weaver, Mayor."

The work was duly constructed in accordance with the specifications of a written contract made with the city by V. Humpich, and was accepted by the city, and the cost, amounting to \$280.17, apportioned among the following named owners of property, as appears from the list furnished by the city assessor:

Albert Button, 40x200.....	8,000 sq. ft.	\$ 26 33
Josephine Berry, 40x200.....	8,000 " "	26 33
A Button, 33' 6"x116.....	4,234 " "	13 94
Mary Callahan, 30x116.....	3,480 " "	11 45
Ella Friedlieb, 30x116.....	3,480 " "	11 45
A. Button, 23.5x116.....	2,726 " "	8 97
A. Button, 80x120.....	9,600 " "	31 60

Totals East side.....39,520 sq. ft. \$130 08

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West Side.

Chess-Wymond Co., 31x95.....	2,945 sq. ft.	\$ 9 69
Gertrude W. Pate, 65x95.....	6,175 " "	20 32
Frank Schwab, 30x95.....	2,850 " "	9 38
Elijah Riggs, 28x95.....	2,660 " "	8 76
Chess-Wymond Co., 27' 4"x95.....	2,597 " "	8 55
Emma A. Sigel, 30x95.....	2,850 " "	9 38
R. T. Meek, 27' 4"x95.....	2 597 " "	8 55
Chess-Wymond Co., 1,334x95.....	126 " "	41
Chess-Wymond Co., 240x95.....	22,800 " "	75 05
<hr/>		
Totals West Side.....	45,600 sq. ft.	\$150 05
Totals East side.....	39,520 " "	130 09
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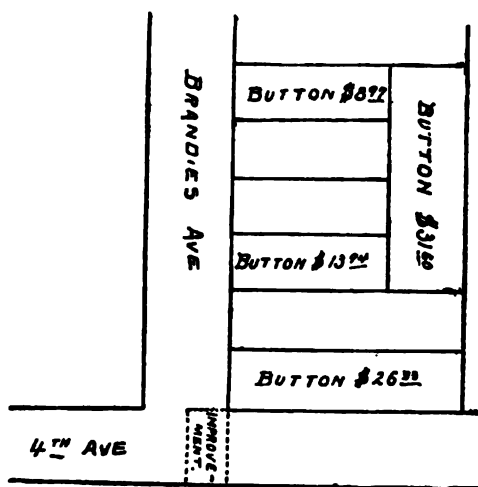
Total amount of contract....85,120 sq. ft. \$280 17

And apportionment warrants were issued to the contractor against the property liable for the cost of the improvement, which was subsequently assigned to the appellee, Henry L. Kremer, who instituted this suit, asking an enforcement of the lien against the property. The city of Louisville was also made a party, with a view of taking a judgment against it in the event the court refused to subject the lots of the other defendants. The defendant A. Button answered that his lots could not be subjected to the apportionment warrants, for the reason that the territory contiguous to Fourth street, between the center line of Brandeis avenue, extended, and the south line of Brandeis avenue, extended, was not on or prior to the 6th day of June, 1898, nor since, defined into squares, or included within territory bounded by principal streets, and further alleged that none of the lots sought to be subjected fronted upon Fourth street, between the center and south lines of Brandeis avenue, extended.

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The following facts were agreed to: "First, that Fourth street and Brandeis avenue are principal public streets of and in the city of Louisville; second, that Fourth street extends from the north limits of Louisville south to a point beyond Brandeis avenue, extended; third, that Brandeis avenue extends from First street west to the east line of Fourth street, and no further; fourth, that there is no street west of Fourth street, opposite to the improvement authorized by the ordinance set up herein; fifth, that the territory fronting said improvement is not defined into squares by principal streets."

The following plat of the territory assessed by the ordinance will assist in illustrating the situation:



The chancellor held that the property of the defendant Button was in lien for the apportionment warrant, and adjudged its sale, and the defendant has appealed. He insists that as the contiguous territory is not defined into squares by principal streets, and his lots do not front the improvement, they can not be charged with payment therefor, un-

der section 2833 of the Kentucky Statutes, which is a section of the charters of cities of the first class, and which reads as follows: "When the improvement is the original construction of any street, road, lane, alley or avenue, such improvement shall be made at the exclusive cost of the owners of lots in each fourth of a square, to be equally apportioned by the board of public works according to the number of feet owned by them respectively. And in such improvement the cost of the curb shall constitute a part of the construction of the street or avenue and not of the sidewalk. Each subdivision of the territory bounded on all sides by principal streets shall be deemed a square. When the territory contiguous to any public way is not defined into squares by principal streets, the ordinance providing for the improvement of such public way shall state the depth on both sides fronting said public improvement to be assessed for the cost of making the same according to the number of square feet owned by the parties respectively within the depth as set out in the ordinance." It will be observed that the statute provides for two conditions in which a tax may be levied: First, if the territory to be charged with the cost of constructing the street is bounded on all sides by principal streets, the cost must be apportioned among the owners of lots in each one-fourth of a square contiguous to the improvement. If, on the other hand, the territory contiguous to any public way is not defined into squares by principal streets, the ordinance providing for the improvement of such public way must state the depth on both sides fronting said public improvement which are to be assessed for the cost of making same, according to the number of square feet owned by the parties, respectively, within the depth set out in the ordinance. This case does not fall within either of the conditions recited in the

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statute. It is admitted that the contiguous territory is not defined into squares, and it is apparent from the admitted facts that appellant's property does not front that part of Fourth street, with the improvement of which they are sought to be charged in this proceeding. The statute has failed to provide for the exact conditions shown to exist in this case. The tax can not be assessed in either mode pointed out by the statute, and, if it be upheld, the chancellor must exercise the legislative function of establishing for this particular case a rule of assessment not provided for. "It is a principle universally declared and admitted that municipal corporations can levy no tax, general or special, upon the inhabitants or their property, unless the power be clearly and unmistakably given. . . . And this rule applies to the assessment for local improvements." See Dill. Mun. Corp., sec. 605, and *Caldwell v. Rupert*, 73 Ky., 182. And such power is always strictly construed. Applying this principle to the facts of this case, we reach the conclusion that the general council have no power to impose the cost of the construction of this small part of Fourth street upon any property, and that its cost necessarily falls upon the city, under its contract with Humpich.

For reasons indicated, the judgment is reversed, and cause remanded for proceedings consistent with this opinion.

CASE 51—ACTION BY T. P. WHITLOW'S ADMR. AGAINST LOUISVILLE & N. R. R. CO. TO RECOVER DAMAGES FOR PERSONAL INJURIES TO PLAINTIFF'S INTESTATE RECEIVED IN THE STATE OF TENNESSEE.—DEC. 10, 1897.

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APPEAL FROM THE WARREN CIRCUIT COURT.

JUDGMENT FOR PLAINTIFF AND DEFENDANT APPEALS. AFFIRMED.

RAILROADS—RESIDENT OF THIS STATE NEGLIGENTLY KILLED IN TENNESSEE—CONFLICT OF LAWS—LIABILITY UNDER TENNESSEE STATUTE.

Held: Plaintiff's intestate was killed in Tennessee where contributory negligence will not defeat the action, but goes in mitigation of damages only. In an action for damages brought in Kentucky, the liability for damages is governed by the laws of the State of Tennessee.

J. A. MITCHELL, FOR APPELLANT.

H. W. BRUCE & WM. LINDSAY, OF COUNSEL.

The appellee's intestate, T. P. Whitlow, an unmarried man about twenty-two years of age, while engaged in coupling the locomotive to the freight train on which he was a brakeman, was killed on the — day of November, 1889, at Fountain Head, a station on appellant's railroad in the State of Tennessee. At the time of his death the intestate was and had always been a resident and citizen of Warren county, Kentucky. The facts need not be further stated in the view we have of this case.

On February 8, 1890, this action was instituted in the Warren circuit court by his administrator, appointed and qualified in said county, to recover damages for the death of said intestate because of the alleged negligence of the engineer and conductor of said train and under the statute of Tennessee, which reads as follows:

"3130. The right of action which a person, who dies from injuries received from another, or whose death is caused by the wrongful act, omission or killing by another, would have had against the wrongdoer in case death had not ensued, shall not abate or be extinguished by his death, but shall pass to his

widow, and in case there is no widow, to his children, or to his personal representatives, for the benefit of his widow or next of kin, free from the claims of creditors.

"3132. The action may also be instituted by the widow in her own name, or if there be no widow, by the children.

"3133. If the deceased had commenced an action before his death, it shall proceed without a revivor. The damages shall go to the widow and next of kin, free from the claims of the creditors of the deceased, to be distributed as personal property.

"3134. Where a person's death is caused by the wrongful act, fault or omission of another, and suit is brought for damages, the party suing shall, if entitled to damages, have the right to recover for the mental and physical suffering, loss of time and necessary expenses resulting to the deceased from the personal injuries, and also the damages resulting to the parties for whose use and benefit the right of action survives from the death consequent upon the injuries received."

Among other defenses, the appellant pleaded and relied upon contributory negligence on the part of the intestate. There have been three jury trials of the case. On the first trial the jury failed to agree and were discharged. On the second trial there was a verdict for the appellant, which, on appellee's motion, was set aside and a new trial granted because of alleged error in the instructions of the court. The third trial resulted in a verdict of \$2,000 for the appellee, to reverse which, as well as the judgment of the court setting aside the verdict for appellant and granting a new trial, this appeal is prosecuted.

On the first two trials the court gave in its instructions to the jury the law of contributory negligence as expounded and understood in this State, and it seems never to have occurred to the trial court nor to appellee's counsel until after the verdict for the appellant on the second trial, that the doctrine of comparative negligence supposed to be peculiar to the common law of Tennessee and some other States, was applicable in a Kentucky forum on the trial of such a case. Nevertheless, it transpired that the verdict for the appellant was set aside upon the sole ground that in the opinion of the court the jury should have been instructed to apply the Tennessee rule of comparative negligence instead of the law of contributory negligence of the forum. In support of this change of base, not a single authority was cited by opposing counsel, although challenged to do so.

While there are some *half dozen reversible* errors prejudicial to the appellant in this record, we shall, in this brief, direct attention exclusively to the error indicated and committed

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by the court, in giving, on the last trial, to the jury, the doctrine of comparative negligence, and in refusing to give on the appellant's motion the law of contributory negligence.

Instruction No. 2, given by the court *sua sponte*, and the court's refusing to give instructions marked "A," "B," "C" and "D" asked for by appellant's counsel, constitute the error complained of now to be discussed. Those instructions read as follows:

"No. 2. Although the jury may believe from the evidence that when he received the injuries which resulted in his death the said Whitlow was himself guilty of negligence that contributed to his said injuries and death, they should, nevertheless, find for plaintiff, if they further believe from the evidence, that notwithstanding the contributory negligence, if any, of said Whitlow, the defendant's said engineer, while in charge of the engine of said train, if he was in charge thereof, was guilty of such negligence, if any, as was the direct and proximate cause of said Whitlow's injuries and death, but in assessing damages, if any, against defendant, the jury should take into consideration the contributory negligence, if any, of said Whitlow in reducing or mitigating the damages."

"A." The court instructs the jury that T. P. Whitlow, when he entered the service of the railroad company as a brakeman, and while he continued in said service, assumed all the ordinary risks and dangers incident to the said business, and, if the jury believe from the evidence that his injury was the direct result of such risks and dangers alone, or the direct and proximate result of his own negligence, then, and in such event the jury must find for the defendant."

Given, January term, 1893. Refused, April term, 1893.

"B." "The court instructs the jury that if they believe from the evidence that the injury to Whitlow was the direct result of his own negligence, or that his own negligence contributed to his injury to such an extent, that, but for his negligence he would not have been hurt, then, and in such event the jury must find for the defendant." Given.

Given, January term, 1893. Refused, April term, 1893.

"C." "By contributory negligence on the part of T. P. Whitlow, as used in the instructions, is meant such negligence or want of ordinary care and caution on his part that, but for such want of care and caution on his part, the injury complained of would not have occurred." Refused.

"D." "Although the jury may believe from the evidence that the engineer, Russell, was guilty of gross negligence in the

operation of his engine at the time Whitlow was hurt, yet, if they shall further believe from the evidence that Whitlow was himself negligent in the manner in which he attempted to make the coupling, and that by reason of such negligence, if any, on his part he was hurt, when otherwise he would not have been hurt, then and in such event the jury must find for the defendant."

Given, January term, 1893. Refused, April term, 1893.

It is a well recognized elementary principle that in matters *ex contractu* the *lex loci contractus*, or the place where the contract was made, governs the constructions and validity of the contract, and that the *lex fori*, or the place where the contract is sought to be enforced, governs the remedy and all matters pertaining thereto. Story on Conflict of Laws, sec. 571; Wharton on Conflict of Laws, secs. 747, 789, 749; 3 Cyclopaedia of Law, 575, *et seq.*

In other words, to use the language of the supreme court of the United States, in *Scudder v. Union National Bank*, 91 U. S., 406:

"Matters bearing upon the execution, the interpretation and the validity of a contract are determined by the law of the place where the contract is made. Matters connected with its performance are regulated by the law prevailing at the place of performance. Matters respecting the remedy such as the bringing of suits, admissibility of evidence, statutes of limitation, depend upon the law of the place where the suit is brought.

"A careful examination of the well-considered decisions of this country and of England will sustain these positions."

On principle, there is no reason why the doctrine of the *lex fori* should not be applied to *actions ex delicto* as well as to *actions ex contractu*. So that, in any event, even if the law of Tennessee were applicable to the case at bar, the instruction complained of (No. 2, ante, p. 3) is erroneous.

If the argument we have advanced be sound and the principle of the authorities relied on be applicable to the case at bar, (and of this we think there can be no question), we are not only entitled to a reversal of the judgment for \$2,000, but also entitled to a reversal of the decision and judgment of the court setting aside the former verdict for the appellant, which decision was made solely for the reason that the supposed doctrine of comparative negligence of Tennessee was applicable to this case. And we respectfully insist that the mandate of this court should require a judgment to be entered for the appellant on that verdict thus erroneously set aside.

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AUTHORITIES CITED.

Code of Tennessee, secs 3130, 3132, 3133, 3134; Story on Conflict of Laws, secs. 571-579; Wharton on Conflict of Laws, secs. 747-8-9; 3 Cyclopedia of Law, 575; Scudder v. Union National Bank, 91 U. S., 406; Nonce v. Richmond & Danville R.y Co., 33 Fed. Rep., 429; Herrick v. Railway Co., 31 Minn., 11; Northern Pacific Ry. Co. v. Babcock, 14 Sup. Ct. Rep., 978; Davis v. Morton, 5 Bush, 160; Depp v. L. & N. R. R. Co., 12 Rep., 366, Owen & McKinney v. L. & N. R. R. Co., 10 Rep., 554; Favre v. L. & N. R. R. Co., 13 Rep., 117; Munos v. So. Pac. Ry. Co., 51 Fed. Rep., 188; Theroux v. Northern Pacific Ry. Co., 64 Fed. Rep., 84; Williams v. Haynes, 27 Iowa, 251 (1 Am. R., 268); Johnson v. Chicago & N. W. Ry. Co., 59 N. W., 67; Bank of Gallipolis v. Trimble, 6 B. M., 599; Parsons on Notes & Bills, 375; 2 Kent, 462; East Tenn., V. & Ga. Ry. Co. v. Hull, 88 Tenn., 33.

B. F. PROCTER, ATTORNEY FOR APPELLEE.

The railroad filed its answer in which it pleaded affirmatively as follows: "In this behalf defendant says that said train and its crew, including the engineer and said decedent, was under the control of the conductor, who, alone, of the defendant's servants on said train was the said decedent's superior," and further in paragraph 5 of said answer, answering affirmatively, it is alleged: "Par. 5. For further answer, the defendant says that at and before the time of the injury to the plaintiff's intestate, which occurred at Fountain Head in the State of Tennessee, on the second day of November, 1889, the law in said State in which the alleged cause of action herein sued on arose, provided that locomotive engineers and brakemen on the same train and composing one crew, were fellow servants, and further provided that the defendant railroad company, in whose employment they were, was not liable in damages or otherwise, for any injury to the brakemen on the same train of cars caused or contributed to by the carelessness or negligence of any act of omission of the engineer in charge of and operating the engine by which said train was drawn at the time of such injury."

Defendant says that at and before the time of the injury to said T. P. Whitlow at Fountain Head in the State of Tennessee, on the second day of November, 1889, it was the law of said State, and from that time to this has been at all times, and is now the law of said State of Tennessee, that the defendant, railroad company was not, and is not responsible or in any degree liable for any injury done to any brakeman while

in discharge of his duties as such brakeman, by the locomotive engineer of the train upon which such brakeman was at the time at work in his said capacity of brakeman; that if the brakeman so injured and the engineer so causing or contributing to said injury were at the time members of the same train crew, on the same train, and engaged in the discharge of their respective duties as such brakeman and engineer, they were and are deemed by the law of said State of Tennessee, fellow servants, and by the provisions of said law of Tennessee, the defendant railroad company was not and is not to any extent or in any manner liable for an injury done or resulting to such brakeman by reason of the carelessness or negligence of such engineer."

"Defendant says that the engineer referred to by the plaintiff in his petition as the person through whose negligence the injuries complained of resulted, was, at the time in charge of and operating the engine, and was at the time a member of the same crew of which said brakeman, T. P. Whitlow, was at the time a member, being one of the three brakemen then employed and engaged upon said train."

Those allegations were never amended or withdrawn, and with the issues so made, the trial judge excluded from the jury all the testimony of several witnesses named in the grounds for a new trial, tending to show that the engineer, Russell, was habitually incompetent and reckless, and excluded from the jury the evidence of J. S. Johnson, showing that the engineer was in fact in charge of the engine, and acting as the superior of Whitlow, when he was killed, and excluded from the jury as evidence, the petition of Edmonson's administrator, and appellant's answer thereto, in which it was distinctly alleged that engineer Russell was reckless and incompetent, and it was known to appellant and the answer showed that the suit was pending in the Logan circuit court for the killing of Edmonson with the answer and denial of the fact of competency and the knowledge of defendant, both denied, when Whitlow was killed by the same engineer at Fountain Head. This was the highest evidence of *notice* to appellant, but the fact of incompetency could not be so proved. And notwithstanding the Tennessee law as to fellow servants was pleaded and relied on by both parties, the court adopted the Kentucky law in its instructions, and instructed that contributory negligence was an absolute bar to recovery. The jury so instructed and the case so presented, found for defendant. A new trial was prayed by appellee, and the court reviewing all the errors complained of, as this court says is proper, in *Harper v. Harper*,

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12 Bush, and being satisfied that appellee had not had a fair trial sustained the motion.

At the August term 1893, the case was again called and Johnson's deposition nearly all admitted, and the pleadings in the cause at Russellville were admitted as shown by the record, and the court was given the Tennessee law as relied upon by both parties, and the jury returned into court a verdict for \$2,000 from which this appeal is prosecuted.

SUMMARY.

1. The *lex fori* governs as to procedure, process, pleadings, limitations, etc., because the statute so provides, but the *lex loci* is a part of the remedy without which the remedy does not exist, and it governs when shown to the court. Bruce's Admr. v. Cin. R. R. Co., 7 Ky. Reporter, 59 and 469; Whiteford v. Panama R.R. Co., 24 N. Y., 466; Alexandria Canal Co. v. Francis Swann, 5 Howard, 83.

2. Law of Tennessee. Depositions of Judges Wilson, Dickenson, Pitts and Vertress, manuscript opinion in Hendricks v. R. R., 4 Pickle, 719; 2 Pickle, 74; 1 Pickle, 227.

3. The pleadings in the Edmonson case were competent evidence. Solomon R. R. Co. v. Jones, 15 Am. & Eng. R. R. Cases, 201.

4. What occurred between conductor and engineer was not hearsay, but original evidence showing who was in charge, and further was part of *res gestae*, Greenleaf on Evidence, 1, vols. 171, 179, 186, 201, 551; L. & N. R. R. v. Foley, 15 Ky. Reporter, 17; L. & N. v. Earles' Admx., Idem., 184.

5. Rule as to new trial. McKinney v. Com., 1 J. J. M., 320; Chrisman v. Gregory's Heirs, 4 B. M., 474; Harper v. Harper, 10 Bush, 451.

EDWARD W. HINES AND W. S. PRYOR, FOR APPELLEE.

The only ground upon which counsel for appellant relies for a reversal is alleged error of the court in refusing to give to the jury the Kentucky Law as to contributory negligence. For reply to the defendant's plea of contributory negligence, the plaintiff alleged that the contributory negligence of the plaintiff is not a defense under the Tennessee law but is considered merely in mitigation of damages, and the evidence showing such to be the fact, the court in effect so instructed the jury. So the only question presented to this court is whether the Kentucky law or the Tennessee law as to contributory negligence applies, unless, indeed the appellant has by its answer and rejoinder waived its right to insist upon the Kentucky

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law, which I insist it has done. It is insisted by counsel for appellant that this is a matter that pertains to the remedy alone, and that, therefore, the law of the forum applies.

In the case of Bruce's Admr. v. Cincinnati R. R. Co., 83 Ky., 181, in which this court held that an action could be maintained in this State under the Tennessee statute, the court said: "We are of the opinion the action can be maintained, and recovery had, in this State, in the same manner, for the same cause and to the same extent, as if the action had been brought in the State of Tennessee, where the cause of action arose."

To allow contributory negligence to be pleaded here as an absolute defense when it is not a defense under the law of Tennessee, is not to allow the plaintiff to recover *in the same manner and to the same extent* as if the action had been brought in Tennessee. The construction placed upon the Tennessee statute by the courts of that State becomes a part of the statutes, and must be followed by the court of this State when the statute is attempted to be enforced here. (7 Lawson's Rights, Remedies and Practice, p. 5831.)

CITATIONS.

Bruce's Admr. v. Cin. R. R. Co., 83 Ky., 181; 7 Lawson's Rights, Remedies and Practice, p. 5831; Wintuska's Admr. v. L. & N. R. R. Co., 14 Ky. Law Rep., 579; Hovis v. Richmond, &c. R. R. Co., 91 Ga., 36; Alabama Great Southern R. R. Co. v. Carroll, 18 L. R. A., 433; Usher v. West Jersey R. R. Co., 4 L. R. A., 261; McDonald's Admr. v. McDonald, &c., 96 Ky., Herrick v. Minneapolis & St. Louis Ry. Co., 31 Minn. p. 12; L. & N. R. R. Co. v. Graham's Admr., —; Dennick v. R. R. Co., 103 U. S., 17.

OPINION OF THE COURT BY JUDGE PAYNTER—AFFIRMING

While T. P. Whitlow was in the service of the appellant as brakeman on one of its trains he is alleged to have been killed by gross and willful negligence of the servants and employes of the appellant in charge of the train. At the time of his death he was a resident of this State, and his father qualified as his personal representative in the Warren county court. That the personal representative had the right to maintain the action, if the liability existed under the laws of Tennessee, can not be questioned. Bruce's

Adm'rs v. Railroad Co., 83 Ky., 174; (7 R., 159) Wintuska's Adm'r v. Railroad Co. (14 R., 579), 20 S. W., 819. He seeks to recover by virtue of the statute of Tennessee authorizing a recovery when death results from the wrongful act, fault, or commission of another, and the law as settled in that State in the administration of the statute. It is a well-settled principle in all civilized countries, so far as we are aware, that in matters *ex contractu* the *lex loci contractus* governs the construction and the validity of the contract, and that the *lex fori* governs the remedy. This principle is so familiar it would be waste of time to cite elementary authorities or adjudged cases in support of it. As an amplification of the doctrine, it may not be inappropriate to quote from Scudder v. Bank, 91 U. S., 406, wherein it is said: "Matters bearing upon the execution, the interpretation, and the validity of the contract are determined by the law of the place where the contract is made. Matters connected with its performance are regulated by the law prevailing at the place of performance. Matters respecting the remedy, such as the bringing of suits, admissibility of evidence, statutes of limitation, depend upon the law of the place where the suit is brought. A careful examination of the well-considered decisions of this country and of England will sustain these positions." We can see no reason why the doctrine as established as to actions *ex contractu* may not be applied to actions *ex delicto*. There seem to be but few decisions on the question. In the case of Nonce v. Railroad Co., 33 Fed., 434, it was held that there is no distinction on the subject between actions *ex contractu* and *ex delicto*. Herrick v. Railway Co., 31 Minn., 11, 16 N. W., 413, was an action *ex delicto*, and the court held that the law of the place where the right was acquired or the liability incurred governs as to the right of

action, while all that pertains merely to the remedy is controlled by the law of the State where the action is brought, thus recognizing the principle as the same where the right of action is *ex contractu* or *ex delicto*. The question presented to the court is whether the Kentucky or Tennessee law as to contributory negligence applies. Under the Tennessee law, if the intestate was himself guilty of negligence that contributed to his injury and death, yet if the defendant was guilty of negligence which was the direct and proximate cause of the intestate's injuries and death, then the plaintiff is entitled to recover, but the damages recoverable should be reduced or mitigated by reason of the intestate's contributory negligence. Under our law, if the intestate was guilty of such contributory negligence except for which his injuries and death would not have occurred, then there can be no recovery. Contributory negligence, under our rule, is never applied to the mitigation of damages. The question is whether the contributory negligence relates to the right or to the remedy. The right to plead a counterclaim or a set-off relates to the remedy. In *Davis v. Morton*, 5 Bush, 160, it was held that the defendant was allowed to plead a set-off to a note, although not allowed by the laws of Tennessee, where the note was executed. Under our system of pleading, counterclaims in certain cases are allowed. A counterclaim, under our system of pleading, is a cause of action against the plaintiff, or against him and another, which arises out of the contract or transaction stated in the petition. A set-off is a cause of action upon a contract, judgment, or award in favor of the defendant against plaintiff, or against him and another, and it can not be pleaded except in an action upon a contract, judgment or award. The defendant who pleads a counterclaim admits the contract or transaction, and seeks a recovery on his

counterclaim growing out of it. The defendant who pleads a set-off admits his liability on the cause of action stated in the petition, but claims he is entitled to a credit by way of set-off. The plea of the statute of limitations generally relates to the remedy. In pleading the statute of limitations, the defendant admits that the cause of action or liability existed, but says that the plaintiff has slept too long on his rights, and his right to recover is barred. This is a defense which arises after the liability is incurred. The existence of the right to plead a counterclaim, a set-off, or the statute of limitations does not show that the cause of action did not exist, but, on the contrary, admits its existence. When we say that a counterclaim or a set-off is a matter relating to the remedy, we mean that if they exist they may be relied upon as a defense to the action. Suppose, however, that, under the *lex loci contractus*, they did not exist, we could not say that, had the transaction occurred in the State, the liability therefor would have existed. Therefore they are available as defenses in this State. To do this would be to utterly disregard the *lex loci*. It would be creating a liability or cause of action when none existed in the place where the transaction or contract took place. To make our meaning clear, suppose that the set-off pleaded was a note which was void under the laws of the place where executed, or for some cause did not impose any liability on the plaintiff; the court would not adjudge that it was binding on the payor because it would have been so had it been executed in this State.

From all the facts attending the injury, it must be determined whether the defendant has incurred a liability for damages and the extent of it. The law of Tennessee must govern in fixing the liability and the quantum of recovery. It would be strange to apply the law of Tennessee in de-

termining the question of liability, and take the law of the forum to fix the measure of recovery. It would be stranger still for the court to hold that the law of Tennessee should govern in fixing the liability, then apply the law of Kentucky, which would prevent a recovery, although a recovery is authorized by the law of Tennessee. It would be in one breath declaring the Tennessee law should determine the liability, and in the next instant adjudging that Kentucky law shall determine the liability and defeat a recovery. Suppose that, under the laws of this State, contributory negligence was not available in an action for the negligent killing of a human being, but in Tennessee it was. Could it be said, in an action brought in this jurisdiction for the negligent killing in Tennessee, that the law in that State allowing such a plea was not available as a defense because it related, not to the right of action, but to the remedy? It could not be said it pertained to the remedy. It would be a fact that would in part determine the question of liability or of the right of action. The conduct of the intestate is part of the facts from which the liability of the defendant is fixed, and measures the relief to which the personal representative is entitled. *Bruce's Adm'r v. Railroad Co.* was an action under the Tennessee statute. The court said: "We are of the opinion the action can not be maintained and recovery had in this State in the same manner, for the same cause, and to the same extent as if the action had been brought and prosecuted in the State of Tennessee, where the cause of action arose." If contributory negligence is available to defeat a recovery in this case, then the plaintiff can not recover in the same manner and to the same extent as if the action had been brought in Tennessee.

Railroad Co. v. Graham's Adm'r, 98 Ky., 688 (17 R., 1229), 34 S. W., 229, was an action under the statute of Alabama for a negligent killing. The court held that the measure of damages, as determined by the decisions of the Alabama supreme court, should be applied in the case. The case of Johnson v. Railroad Co., 91 Iowa, 248, 55 N. W., 66, is cited by counsel for appellant to sustain his contention that Kentucky law of contributory negligence should prevail. The injury in that case occurred in Illinois, and the action was brought in Iowa. The doctrine of comparative negligence prevailed in Illinois, and the Iowa court refused to follow the rule. The court disposed of the question in a few lines as to whether the doctrine of comparative negligence which had been established by the decisions of the courts of Illinois should prevail in that case. Kinne, J., took no part in the decision. Robinson, J., expressed no opinion on the question, but said that it was not necessarily involved in a determination of the case. Knight v. Railroad Co., 108 Pa. St., 250, and Herrick v. Railroad Co., 31 Minn., 11, 16 N. W., 413, are cited by the court to sustain its conclusion. In neither of these cases cited was the same question involved which the Iowa court adjudged, nor was there a similar question involved in them. The question in Knight v. Railroad Co. presents the right to maintain an action against a foreign corporation to recover damages in an action *ex delicto* for negligence causing the death in another State. The court held that such an action could be maintained. The Pennsylvania court recognized the correctness of the doctrine of Herrick v. Railroad Co.; and the court in the latter case said: "Whenever, by either common law or statute, a right of action has become fixed and a legal liability incurred, that liability, if the action be transitory, may be enforced, and the right of action pursued,

in the courts of any State which can obtain jurisdiction of the defendant, provided it is not against the public policy of the laws of the State where it is sought to be enforced. . . . The statute of another State has, of course, no extraterritorial force, but rights acquired under it will always, in comity, be enforced, if not against the public policy of the laws of the former. In such cases the law of the place where the right was acquired or the liability was incurred will govern as to the right of action, while all that pertains merely to the remedy will be controlled by the law of the State where the action is brought; and we think the principle is the same whether the right of action be *ex contractu* or *ex delicto*." Of course, there is no question of public policy involved in the case, because we have a statute of the same general import of the statute of Tennessee. *Dennick v. Railroad Co.*, 103 U. S., 11, was an action for injuries resulting in death, and the court held it was transitory. The court said: "It is difficult to understand how the nature of the remedy, or the jurisdiction of the courts to enforce it, is in any manner dependent on the question whether it is a statutory right or a common-law right. Wherever, by either the common law or statute law of a State, a right of action has become fixed, and a legal liability incurred, that liability may be enforced, and the right of action pursued, in any court which has jurisdiction of such matters and can obtain jurisdiction of the parties." At the time the injury was inflicted the right of action became fixed, and a legal liability was incurred. The liability which the plaintiff seeks to enforce was incurred by virtue of the law of Tennessee. The law of contributory negligence, as adjudged in this State, can not be applied so as to alter or affect the right of action which arose in Tennessee. For these reasons the judgment is affirmed.

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CASE 52—ACTION BY PAULINA CRAWFORD'S HEIRS V. W. J. THOMAS, TRUSTEE, AND OTHERS TO INVALIDATE PART OF THE WILL OF PAULINA CRAWFORD.—DEC. 9, 1899.

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APPEAL FROM SHELBY CIRCUIT COURT.

JUDGMENT FOR DEFENDANTS AND PLAINTIFFS APPEAL. AFFIRMED ON ORIGINAL AND REVERSED ON CROSS APPEAL.

WILLS—CHANGE OF LAW AFTER PROBATE—CHARITABLE BEQUEST—CERTAINTY OF OBJECTS—COSTS.

- Held: 1. The validity of a bequest is to be determined by the statute in force at the death of the testator, and when the will was probated.
2. Under Gen. St., c. 13, section 1, providing that, with certain restrictions, all devises and gifts for the benefit of any of certain objects, including churches, "or for any other charitable or humane purpose," shall be valid, a bequest of a fund to a trustee, to be expended "in securing an evangelist," and "in the advancement of the principles of primitive Christianity as taught by the Christian Church," is valid as a charitable bequest to aid in the advancement of the principles of primitive Christianity as taught by the Christian Church, otherwise known as the "Reform Church" or "Church of the Disciples of Christ," as the purposes of the charity and the beneficiaries thereof are pointed out with reasonable certainty.
3. Plaintiffs having failed in an action brought by them, as heirs of testatrix, to invalidate the bequest, it was error to charge the trust fund with the costs of the action.

G. G. GILBERT, ATTORNEY FOR APPELLANTS.

W. S. PRYOR, OF COUNSEL.

STATEMENT OF CASE.

Paulina Crawford died a resident of Shelby county. Her will was admitted to record at the August term, 1889, of the Shelby county court. An appeal was prosecuted to the Shelby circuit court from this judgment of the county court, and the will was finally established by a judgment of the Shelby circuit court on the 31st day of March, 1892. The testatrix left a large estate of more than \$50,000. She never had any chil-

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dren; her husband had died many years previously, and her next of kin were the descendants of her brothers and sisters. After making sundry devises, the residuary estate consisting of over \$27,000 she undertakes to dispose of by the 12th and 13th clauses of her will.

These clauses are as follows:

Item 12th. "I give and bequeath to W. J. Thomas as trustee, the sum of five thousand dollars; the interest of which sum to be used in securing an evangelist in Shelby county, or any other section of the country said trustee may select. The said sum shall be held by him and his successors in perpetuity. The said W. J. Thomas may select his successor, who must give bonds and security approved, and said successor, or successors must in every instance be members of the Christian Church. And furthermore, the proceeds of said sum, or sums, shall be expended in the advancement of the principles of primitive Christianity as taught by the Christian Church."

Item 13th. "I direct that my executor shall pay over to a trustee whom he may select, the residue of my estate, the interest of said sum to be used in the advancement of the principles of primitive Christianity as taught by the Christian church, subject to the same conditions as are mentioned in Item 12th."

The defendant, Ben. A. Thomas was nominated the executor in the will, and he duly entered and qualified. He paid out all the funds designated in the first twelve clauses of the will, and having some doubts as to the validity of the devise contained in the 13th clause, on account of no trustee being named, and on account of the vagueness of the devise, filed a suit in this circuit court for the purpose of having the court to determine whether or not he could in safety pay over this residuary fund to a trustee, whom he might designate. The record of that suit is made part of the record in this case and is found from pages 37 to 76 inclusive. The executor in this suit asked that two of the heirs at law, J. W. Crawford and W. J. Thomas, might defend for all of the heirs at law, inasmuch as it was alleged that they were quite numerous, and it was impracticable to bring all of them before the court within a reasonable time. The executor also in that suit designated three members of the Christian church, and asked that they be permitted to defend for the said church, and all of its membership. The court appointed the said J. W. Crawford and Oswald Thomas to defend the suit, but did not appoint W. J. Thomas, who was designated as one of the defendants in the petition. An answer and cross-petition was filed by these two heirs, J. W. Crawford and Oswald Thomas in which they undertake to

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defend for themselves and the other heirs at law. There was in like manner an answer and cross-petition filed by three members of the church, in which they undertake to defend for themselves and all the other members of the said church. There was no process on the original petition, either actual or constructive, against any of the other heirs. There was no affidavit or allegation as to who these heirs were, or as to how many of them there were. There was no warning order and no publication. Neither was there any actual or constructive service of process upon either of the answers or cross-petition. Some proof was taken, and in this condition the court rendered a judgment, that the devise in clause 13 was not void for uncertainty. This judgment did not indicate any purposes to which the fund should be devoted, but left the entire management of the fund to the trustee, and directed the executor to pay over the residuary fund to W. J. Thomas, who was the trustee, designated by the executor. This trustee duly entered and qualified, and has received from the executor not only the \$5,000, named in the 12th clause of the will but more than \$22,000 named in the 13th clause of the will. This trustee has never made any settlement of his accounts, and this suit is instituted by most of the heirs at law of the testatrix claiming that the devises in these two clauses of the will are void for uncertainty, and they are asking for a distribution of the fund among themselves, and the other heirs; and if this can not be had, they are asking for an enforcement of the trust, &c.

Now we contend for these propositions.

1. That the former proceedings are not a bar to this suit.
2. Even under the former statutes and decisions, these bequests are void for uncertainty.
3. But the question as to whether these funds shall go to the heirs, or to the charity, is to be determined by the recent statute and not under the old law.
4. Even if the bequests are held good as donations to charity, the plaintiffs as heirs of the donor have a right to institute this suit, and to see that the trust is faithfully executed.
5. The present trustee has been unfaithful, and if the devises are upheld it is the duty of this court to designate the beneficiaries and to execute the trust.

AUTHORITIES CITED.

Johnson v. Morrison, 5 B. Mon., 106; Singleton v. Singleton, 8 B. Mon., 345; Smith v. Gowdner, &c., 3 Met., 175; Bank v. Cochran, 9 Dana, 395; 6 T. B. Mon., 205; Hays v. Mays, 1 J. M., 498; Taylor v. Bate, 4 Dana, 205; Boone v. Helm, 4 Dana,

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404; Thompson v. Peebles, 6 Dana, 391; Lewis v. Outton, 3 B. Mon., 455; Craig v. McBride, 9 B. Mon., 15; Freeman on Judgments, sec 158; Tinsley v. Martin, &c., 80 Kentucky, 467; Perkins v. Fourniquet, 6 How., U. S., 206; Civil Code, sec. 96, subsec. 3; Civil Code, sec. 39; Frazier's Executors v. Page, 5 Ky. Law Rep., 790; Pennoyer v. Neff, 95 U. S., 570, 572; Smith v. Cutchen, 38 Mo., 415; Durance v. Preston, 18 Iowa, 396; Mitchell v. Gray, 18 Ind., 123; Thompson v. Whitman, 18 Wal. U. S., 457; Compton v. Jesup, 68 Fed. Rep., 263; Morgan, &c. v. Halsey, Trustee, &c., 17 Ky. Law Rep., 529; Williams v. Gibbs, &c., 17 How., 229; David v. Froud, 1 Mi. & K., 200; Greig v. Somerville, 1 Russ & M., 338; Gillespie v. Alexander, 3 Russ., 130; Sawyer v. Birchmore, 1 Keen, 391; Shine v. Gough, 1 Ball & B., 426; Finley v. Bank of U. S., 11 Wh., 304; Story's Eq. Pl. sec. 106; Wiswall v. Sampson, 14 How., 52-67; McArter v. Scott, 113 U. S., 340; Davour v. Fanning, 4 John's Ch., 199; Dehart v. Dehart, 2 H. W. Green (N. I.) 471; Hawkins v. Hawkins, 1 Hare, 543-545; Bradwin v. Harper, A. M. B., 374; Harvey v. Harver, 5 Beav., 139; Willats v. Bushby, 5 Beav., 193-200; Powell v. Wright, 7 Beav., 444-450; Hallett v. Hallett, 2 Paige, 15; Hamilton v. Brown; The Mary, 13 U. S., 9, Cranch, 126, 144, (3, 678, 684); Scott v. McNeal, 154 U. S., 34 46, (38, 895, 901); Hilton v. Guyot, 159 U. S., 113, 167 (anle., 145, 151.); Phillips v. Moore, 100 U. S., 208-212, (25, 603, 204); Arnt v. Griggs, 134 U. S., 316, (33, 918); Hardy v. Beaty, 84 Tex., 562, 569; Penoyer v. Neff, 95 U. S., 714; Bardstown & Louisville R. R. Co. v. Metcalf, 4 Met., 205; Freeman on Judgments, sec. 159; Turnham v. Turriham, 3 B. Mon., 582; I. Pomeroy Eq. Juris., sec. 429; Freeman on Judgments, sec 606; Smith's Leading Cases, vol 2, p. 585; Civil Code, sec. 364; 12 Ky. Law Rep., 121; Bedford's, &c. v. Bedford's Admr., 18 Ky. Law Rep., 201; Penick, Rec-tor, &c. v. Thomas' Trustee, 12 Ky. Law Rep., 613; Kinney, &c. v. Kinney's Executor, 9 Ky. Law Rep., 753; Peynodas De-visees v. Penodas Executors, 5 Ky. Law Rep., 753; Leeds v. Shaw's Adm., 6 Ky. Law Rep., 26; Baptist Church v. Presby-terian Church, 18 B. Mon., 639; Hadden, &c. v. Chorne, &c., 8 B. Mon., 78; Moore's Heirs v. Moore's Devices, 4 Dana, 355; Cromie's Heirs v. Louisville Orphans' Home, 3 Bush, 365; Curling's Adm. v. Curling's Heirs, 8 Dana, 38; Attorney Gen-eral v. Wallace, 7 B. Mon., 611; 2 Perry on rusts, sec 748, n. 1; Baptist Association v. Hart's Executors, 4 Wh. 1, 17 Ky. Law Rep., 532; Gambell v. Tripp, 75 Md., 252; 32 Am. St. Rep., 388; Johnson v. Johnson, 92 Tenn., 559; Tilden v. Green, Green, 130 N. Y.; Read v. Williams, 125 N. Y., 569; McBrayer,

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&c. v. McBrayer's Exrs., 16 L. R., 18; Olliffe v. Wells, 130 Mass., 221; Lewin on Trusts, 3 Ed., 75; Thayer v. Wellington, 9 Allen, 283; Heidenheimer v. Bauman, 84 Tex., 174; Wheeler v. Smith, etc., 9 How., U. S., 55; Fountain v. Revenel, 17 How., U. S., 369; Story's Eq. Juris., secs. 1164 1155 and n.; Grimes v. Hammonds, 35 Ind., 198; Holland v. Peck, 2 Iradell Chan. Rep., 255; Green v. Allen, 5 Hun., 170; Bridges v. Pleasants, 4 Iradell Chan., 26; Colt v. Comstock, 51 Conn., 353; Attorney General v. Soule, 28 Mich., 153; Pritchard v. Thompson, 95 N. Y., 76;; I. Stanton Rev. Stat. chap. 14, sec. 1; Kentucky Statutes, sec. 317; Smith v. Stowell, Ch. Cas., 195; Collinson Case, Hob., 136; See Appendix to 4 Wheaton; Southerland Statutory on Construction, sec 206; Satterlee v. Matthewson, 27 U. S., 380; Chas. River Br. v. Warne Br., 36 U. S., 417; Browson v. Kinzie, 42 U. S., 331; Balt. & O. R. R. Co. v. Nesbit, 51 U. S., 401; Wilder v. Lampkin, 4 Ga, 209; Boston v Cummins, 16 Ga., 102; Davis v. Ballard, 1 J. J. M., 563; Bay v. Cage, 36 Barb., 447; L. St. L. & T. R. R. Co. v. Barrett, &c., 13 Ky. Law Rep., p. 57; 23 Am. & Eng. Ency. of Law, p. 298; Carpenter v. Penn., 17 How., U. S., 172; Drehman v. Stifle, 8 Wall., U. S., 595; 2 Perry on Trusts, sec 618, etc.; Baptist Church v. Presbyterian Church, 18 B. Mon., 640; Chambers v. Baptist Education Society, 1 B. Mon., 220; Cromle v. Bull, etc., 5 Ky. Law Rep., 735; Chap. 14, sec. 2 of Rev. Stat.; Kentucky Statutes, sec. 318; Page's Executor v. Holman, 82 Ky., 576; Civil Code, sec. 472; 3 Pomeroy's Eq., sec. 1421. Sec. 4706 of Kentucky Statutes.

L. C. WILLIS AND P. J. FOREE, FOR APPELLEES.

(No briefs for appellee.)

This case was decided December 9, 1899, and not marked to be reported, but has recently been ordered to be reported, and is here inserted. REPORTER.

OPINION OF THE COURT BY JUDGE BURNAM, AFFIRMING ON ORIGINAL AND REVERSING ON CROSS APPEAL.

This is an appeal from a judgment of the Shelby circuit court. The suit was instituted on the 1st day of May, 1896, by a number of the heirs at law of Paulina Crawford, seeking to invalidate the twelfth and thirteenth clauses of her will, upon the grounds that "they are void for uncertainty," and that "there are no persons who can come into court

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and say that they are interested in the bequest, and demand the enforcement of the power;" and, in event of their failure to secure this relief, they asked the court to remove the trustee, and to designate the beneficiaries of the fund, and to inaugurate a scheme for carrying the device into effect. The facts, as shown by the pleadings, exhibits, and evidence, are that testatrix died a resident of Shelby county; that her will was admitted to probate at the August term, 1889, of the county court; that an appeal was prosecuted from this judgment to the Shelby circuit court; and that the will was finally established by a judgment of that court, based upon the verdict of a jury, in March, 1892. Subsequently, the executor named therein filed a suit in the Shelby circuit court, in which he alleged that he had paid over all of the special devises recited in the will, and that there remained in his hands, to be disposed of under the residuary clause, \$21,867.06; that, by virtue of the power conferred upon him by the will, he selected W. J. Thomas as trustee to take charge of this fund—and asked the court to determine who were the beneficiaries thereof, to construe and guide the trustee and plaintiff in disposing of the fund, and to determine whether or not the devise contained in the thirteenth clause was void for uncertainty. Three representative members of the Christian church, residing in Shelby county, were made parties defendant to this proceeding; and the plaintiff alleged that the heirs at law of testatrix were so numerous as to make it impracticable to bring them all before the court within a reasonable time, and asked the court to designate J. W. Crawford and Oswald Thomas (two of such heirs) to defend for all of them. No process was sued out upon the original petition, but an answer and cross petition were filed by J. W. Crawford and Oswald Thomas, for themselves

and other heirs at law of testatrix, in which they said that the bequest contained in the thirteenth clause of the will of testatrix is void for uncertainty and indefiniteness, and cannot be executed by the executor or by any trustee, and asked the court to so adjudge. This litigation ended on the 1st day of April, 1890, with a judgment in which it was held that the devise contained in the thirteenth clause of the will of testatrix was not void for uncertainty, but was upheld as a charitable bequest to aid in the advancement of the principles of primitive Christianity as taught by the Christian church, otherwise known as the "Reform Church," or "Church of the Disciples of Christ." And it was held that the interest on this fund should be devoted to the advancement of the principles taught by that church, and the details of which were left to the trustee, in the exercise of his own judgment.

The clauses of the will which are assailed in this proceeding are as follows: Item 12: "I give and bequeath to W. J. Thomas, as trustee, the sum of five thousand dollars, the interest of which sum to be used in securing an evangelist in Shelby county, or any other section of the country said trustee may select. The said sum shall be held by him and his successors in perpetuity. The said W. J. Thomas may select his own successor, who must give bonds and security approved, and said successor or successors must in every instance be members of the Christian Church. And furthermore, the proceeds of said sum or sums shall be expended in the advancement of the principles of primitive Christianity as taught by the Christian Church." Item 13: "I direct that my executor shall pay over to a trustee whom he may select the residue of my estate; the interest of said sum to be used in the advancement of the principles of primitive Christianity as taught by the Christian church,

subject to the same conditions as are mentioned in item 12th."

Appellees resist the claims of appellants on their merits, and further plead and rely upon the judgment in the case of *Thomas' Adm'r. v. Thomas' Adm'r*, 87 Ky., 343 (10 R., 223), (10 S. W., 282), as a bar to this proceeding.

In our opinion, this controversy must be determined by the statute in force at the death of the testatrix, in 1889, and when the will was probated, which is in these words: "Section 1. Be it enacted by the General Assembly of the Commonwealth of Kentucky, that all grants, conveyances, devises, gifts, appointments, and assignments heretofore made, or which shall be hereafter made, in due form of law, of any lands, tenements, rents, annuities, profits, hereditaments, goods, chattels, money, stocks, or choses in action, for the relief or benefit of aged or impotent and poor people, sick and maimed soldiers and mariners, schools of learning, seminaries, colleges, universities, navigation, bridges, ports, havens, causeways, public highways, churches, house of correction, hospitals, asylums, idiots, lunatics, deaf and dumb persons, the blind, or in aid of young tradesmen, orphans, or for the redemption of prisoners or captives, setting out of soldiers, or for any other charitable or humane purpose, shall be valid, except as hereinafter restricted." See General Statutes, p. 242, c. 13. By the act of May 12, 1893, which is section 317 of the Kentucky Statutes, these words were added to the statute: "If the grant, conveyance, devise, gift, appointment, or assignment shall point out, with reasonable certainty, the purpose of the charity and the beneficiaries thereof." It was held in *Gass v. Wilhite*, 2 Dana, 177, that the statute of 43 Eliz., on charitable uses and bequests, was adopted in this State under the rule which embraced all English

statutes of a general character which existed prior to 4 Jac., I., and that it was in force here when that opinion was rendered, in 1834. Subsequently the Kentucky Legislature added to the English statute the words, "or for any charitable or humane purpose;" and they also added the second section, so as to remove all difficulty in carrying out the charitable intention of the testator. Mr. Dembitz, in his work on Kentucky Jurisprudence (page 481), in referring to this second section, says: "It goes far to remove the objection of uncertainty in bequests to charities."

There have been conflict and confusions in the adjudications of courts of last resort in construing charitable bequests; and, in undertaking to account for this, Mr. Perry, in his work on Trusts (section 748), says: "The distinctive principles of equity which courts apply to the enforcement and regulation of trusts for charitable uses are confined to those States which have adopted the statute of 43 Eliz. c. 4, or the principles of the common law in regard to trusts as they existed prior to the statute. In some States the statute is expressly repealed, and such repeal has been held to carry with it all the distinctive doctrines of public charities as they are held in England. In other States the statute is said to have been adopted or to be in force. The law of other States is founded upon what is supposed to have been the common law of the ordinary jurisdiction and practice of the court of chancery prior to the statute. It is not very material whether courts of equity in the several States trace their jurisdiction to the statute itself as in force in their State, or whether they exercise the jurisdiction as original and inherent in courts of equity by common law, anterior to the statute. Substantially the same principles are applied, and the same results are reached, in either case. In Maryland neither the stat-

ute nor the principles of the statute have ever had any recognition in their courts. No trust for charity can be established unless the beneficiaries are so certain that they can maintain an action in court in their own names for the benefit of the fund. In Virginia the statute was repealed, and the courts will establish no public trust for a charitable use, except it comes within the strict rules of private trusts. The doctrine of the Maryland and Virginia courts has, in a qualified degree, been followed by the courts of Connecticut, New York, Michigan, Wisconsin, and some other States; but in this State, as said by Mr. Perry, "the courts have carried their equity jurisdiction to the extreme verge of the law, in establishing charities." In the early case of *Moore's Heirs v. Moore's Devises*, reported in 4 Dana, 354, the devise was as follows: "In case my son, Thomas, should depart this life before he arrives at age, then the estate devised to him I desire may be converted into a fund for educating some poor orphans of this county [Harrison], to be selected by the county court, who are the guardians of such, and to be to such as are not able to educate themselves, that it may do as much good in that way as it can. I desire the fund shall be taken and loaned out at interest, so as to be rendered a perpetual fund, and the interest only to be applied to their tuition; thereby affording a partial good to as many orphans as the scanty pittance will allow." In that case the "poor orphans" were not named, but the county court was authorized by the will to make the selection. The bequest was held by this court to be valid and enforceable; and, in the opinion rendered in that case, Judge Robertson has given us an exhaustive review of the history of this doctrine under which such bequests were upheld, with repeated illustrations of its application. In the case of *At-*

torney General v. Wallace's Devisees, 7 B. Mon., 618, the language of the bequest was as follows: "The remaining fourth, to such charitable or benevolent institutions as may appear to be most useful in the dissemination of the Gospel at home and abroad." This was held sufficiently certain and specific, the court saying: "The 'Gospel,' according to the common and more general acceptance of the term, is synonymous with 'Christianity,' or the 'Christian religion;' and the general mode of accomplishing the benevolent purpose of testator was through such charitable and benevolent institutions as may appear most useful and efficient for effecting the object. The particular mode of administering the charity, or the selection of the institutions most useful for that purpose, it was the intention of testator . . . to leave in the discretion of his trustees. That this devise, as a devise in charity, is good, and clearly within St. 43 Eliz. c. 4, of charitable uses [and our own statute], according to the construction which had been given to it in England and America, there can, we apprehend, be no doubt." In the case of Kinney v. Kinney's Ex'r, 86 Ky., 611 (9 R., 753), 6 S. W., 593, this court upheld a bequest in these words: "I do will and bequeath to the M. E. Church South, to be applied to foreign missions, all of my property, real and personal, after the payment of my just debts." This devise was assailed by collateral heirs for uncertainty, but was sustained in these words: "The objection that the devise is so vague that the intention of the testator can not be executed is not well taken. The trustee is named in the will, and the language used by the testator indicated definitely the purpose to which he desired his bounty to be applied. The devise for charity is within the scope of our statute permitting such uses." The court further remarked: "It is true that

the doctrine of *cy pres*, as broadly administered by the English courts, has been rejected in this State, but if it were equally in force here, there would be no need of resort to it in this instance, because the donor has definitely fixed the purpose to which his charity is to be applied; and while this court has seen fit not to aid charities to the extent of making or changing a will, and has refused to go so far as to apply the testator's bounty to an object never contemplated by him, and to which he probably would not have contributed, yet, because they are blessings in which all are more or less interested, they are looked upon with peculiar favor by our courts, and will not be allowed to fail for want of a trustee; and if their object, as intended by the donor, be ascertainable, and consistent with the law and public policy, they will be upheld." In the case of *Givens' Adm'r v. Shouse*, 5 Ky. Law Rep., 419, the devise was a certain sum to trustees, "to be devoted by them to such benevolent objects and purposes as they may select;" the testator requesting them, "in making the distribution, to give preference to charities, connected with, or under control of, the Christian Brotherhood," which was upheld. In the case of *Leeds v. Shaw's Adm'r*, 82 Ky., 79 (6 R., 26) the bequest was to the trustees of the Lagrange school district, and to be by them "expended in the education of poor children, and towards the maintenance of a good common school in said district, in such way as the trustees shall think will be best in order to do the most good to the poor children in said district;" and this was upheld as sufficiently definite. In the great case of *Cromie's Heirs v. Society*, 3 Bush, 365, in an opinion rendered by Judge Robertson, this court said: "While the statute of Elizabeth concerning charities was constructively abolished in Kentucky (1 Rev. St., p. 77), it was, in American phase,

substantially re-enacted. *Id.*, p. 235. And thus, though the ultra judicial cy pres doctrines which royal prerogative attached as excrescences to the statute of Elizabeth, had by its repeal been cut off as tumors, the aim of our own statute for upholding charities is to make such as it enumerates available whenever so defined as to be judicially identified and applied. . . . And by the second section of the act, which provides, 'No charity shall be defeated for want of a trustee or other person in whom the title may vest,' courts of equity may uphold the same by appointing trustees, if there be none, or by taking control of the fund or property, and directing its management, and settling who is the beneficiary thereof. But, with the restrictive interpretation thus indicated, charities, in Kentucky, as well as in England and elsewhere, have long been, and yet are, peculiar favorites of modern jurisprudence. The only object of the repeal of the British statute, in some respects more local and consistent with British policy, was to substitute a system more congenial with our institutions, and, by a legislative indorsement of the doctrine suggested in *Moore's Heirs v. Moore's Devises*, *supra*, to eliminate the cypres doctrine of England. Consequently American charity, properly defined, and judicially upheld and applied, is still a favored nursing of Kentucky."

These adjudications are in substantial accord with the decisions of all the American States in which the statute of 43 Elizabeth has been followed, and also with the views of the leading text writers upon this subject. See *Beach, Wills*, 136; *Story*, in appendix to 3 *Pet.*; and *Perry, Trusts*, section 687. The last author, after an exhaustive review of all the cases, English and American, on this subject, summarizes the law in these words: "If it is once de-

terminated that the donor intended to create a public charity, very different rules from those that are applied in establishing and administering private trusts will be applied, in order to give effect to the intention of the donor and establish the charity. Thus, if in a gift for private benefit the *cestui que trustent* are so uncertain that they can not be identified, or can not come into court and claim the benefit conferred upon them, the gift will fail, and result to the donor, his heirs or legal representatives. But, if a gift is made for a public charitable purpose, it is immaterial that the trustee is uncertain or incapable of taking, or that the objects of the charity are uncertain and indefinite. Indeed, it is said that vagueness is, in some respects, essential to a good gift to a public charity, and that a public charity begins where uncertainty in the recipient begins. So, if a gift for a private purpose tends to create a perpetuity, it will be void; but a gift for a public charity is not void, although in some forms it creates a perpetuity. 'Tis said that courts look with favor upon charitable gifts, and take special care to enforce them, to guard them from assault, and protect them from abuse. And certainly charity in thought, speech and deed, challenges the affection and admiration of mankind. Christianity teaches it as its crowning grace and glory, and an inspired apostle exhausts his powerful eloquence in setting forth its beauty, and the nothingness of all things without it."

When we apply the legal principles illustrated by this long line of authorities to the provisions of testatrix's will which we are called upon to construe in this proceeding, we inevitably conclude that neither of them can be declared ineffectual, as both point out with reasonable cer-

tainty the purposes of the charity and the beneficiaries thereof. Testatrix clearly intended that the accumulations on the funds therein devised should be used to preach the doctrines of the church of which she had been a zealous member during a long lifetime, and which had been so clearly and strikingly enunciated by the leaders of her faith. There is nothing in the language of these clauses of testatrix's will which would authorize the use of the interest on these funds in promoting the cause of general education, or in founding charitable institutions, or in assisting any of the numberless good works which an active Christianity has developed. The dominant and controlling idea in the application of the fund devised is that it should be used in the propagation of primitive Christianity as taught by the Christian Church, to which she belonged. While item 12 limits the use of the fund devised in that clause to the propagation of these doctrines in this country, item 13, having the same object in view, takes in a wider scope, and authorizes the use of the interest on the fund devised in that clause to be devoted to the same purpose wherever it could be most profitably employed. It is also manifest that the testatrix intended that this should be done through the agency of evangelists of the church.

It is unnecessary to discuss the plea of *res judicata* relied on by appellee, and which has been elaborately discussed

Appellee prosecutes a cross appeal from so much of the judgment as required him to pay the costs of the proceeding, and a reasonable fee to appellants' attorney. The evidence in this case shows that a large per cent. of these funds has been heretofore expended by the executor and trustee in defending proceedings instituted by appellants, which had in view the identical object sought in this pro-

ceeding, which was to invalidate these bequests, and have the funds therein devised appropriated to their own use. This object is utterly inconsistent with the idea of requiring of the trustee a faithful performance of his duties under the trust, and of enforcing it for the benefit of the *cestui que trust*. And, as appellants were unsuccessful in the real issue and purpose for which the litigation was instituted, they were liable for the costs of the proceeding, under the provisions of the Code. To change this rule, and require appellee to pay the costs and appellants' attorney, would be to offer a premium for attacks upon these provisions of the will from the same parties; for if they can recover their attorney's fee and costs in such a proceeding, under the guise that they are solicitous for the proper execution of the trust, there is certainly nothing to deter them from instituting such proceedings as often as they please, as they would have nothing to lose thereby. For the reasons indicated, the judgment is affirmed on original, and reversed on cross, appeal, and remanded, with instructions to dismiss the petition, with judgment for appellee's costs.

Dissenting opinion by Judge DuRelle, January 1, 1900.

I concur in the opinion of the court as to the 12th clause of the will under consideration, which devotes the interest of the fund to secure an evangelist to advance certain ascertainable religious principles in a prescribed district, and also provides for a trustee to select the evangelist. This seems to be a sufficiently definite charitable purpose to be carried out under the doctrine in force in this State. If I could believe that by the 13th clause the testatrix intended the interest of the other fund to be expended in like manner in securing evangelists for the advancement of those

religious principles, though without restriction as to locality' and could believe also that that intention was, by any fair construction, deducible from the language of the will, I should concur in the opinion throughout.

But I do not believe such an intention can be fairly deduced from the language used, for, in my judgment, the phrase "subject to the same conditions as are mentioned in item 12" refers alone to the bond required to be given by the trustee, and the requirement that the trustee should be a member of the particular denomination named.

I therefore dissent from so much of the opinion as gives validity to the 13th clause.

DECISIONS
OF THE
Court of Appeals of Kentucky.

JANUARY TERM, 1903.

CASE 53—ACTION BY G. A. HENDON AGAINST THE CUMBERLAND TELEPHONE & TELEGRAPH COMPANY FOR DAMAGES FOR DISCONTINUING THE USE OF THE TELEPHONE IN PLAINTIFF'S HOUSE.—JAN. 7, 1903.

**Cumberland Telephone & Telegraph Co.
v. Hendon.**

APPEAL FROM JEFFERSON CIRCUIT COURT, COMMON PLEAS DIVISION.

JUDGMENT FOR PLAINTIFF AND DEFENDANT APPEALS. REVERSED.

TELEPHONES—WRONGFUL DISCONNECTION—MEASURE OF DAMAGES.

Held: By mistake, a physician's telephone was disconnected for non-payment of rent, when, in fact the rent had been paid. During the eighteen hours it had been disconnected, persons endeavoring to reach the physician by telephone were informed that the telephone had been disconnected for non-payment of rent. **HELD**, in an action by the physician against the company for damages, it appearing that, although considerably annoyed, he had suffered no pecuniary injury, he is not entitled to recover punitive damages—the measure of damages being the amount paid for the service for the time the 'phone was disconnected, taking for the basis the amount paid by the month.

FAIRLEIGH, STRAUS & EAGLES, FOR APPELLANT.

PRYOR & SAPINSKY AND O'NEAL & O'NEAL, FOR APPELLEE.

(No briefs.)

Cumberland Telephone & Telegraph Company v. Hendon.

OPINION OF THE COURT BY JUDGE HOBSON—REVERSING.

Appellee, Hendon, is a physician, living in Louisville. He was a patron of the appellant, the Cumberland Telephone & Telegraph Company, and had one of its instruments in his office. Appellant discontinued the telephone from 3 o'clock p. m. of October 23, 1900, to 8:45 a. m. the next morning, or something less than 18 hours, and this action was brought to recover damages therefor. The reason the telephone was disconnected was that the book-keeper made a mistake in posting the amount paid. His book did not show that Hendon had paid for the month of September, although he had in fact paid. On October 22d, a notice was sent to him that his 'phone was discontinued for this reason, and, he having paid no attention to the notice, 24 hours afterwards the connection at the office was severed, although the instrument was not removed. When he got home at 6 o'clock that evening and found that he had been cut off, he tried to 'phone to the office, but failed to get them. The next morning he went down, the mistake was at once corrected, and the instrument was no longer discontinued. The proof showed that he had not only paid for September, but had also paid in advance for October, November and December. It also showed that one person who needed the doctor for his wife that night, being unable to reach him by 'phone, walked to his office and waked him up. It also showed that three other persons who wished to talk with him were unable to reach him on the 'phone, and that, when one of them asked at the office what was the matter, the assistant manager answered that his 'phone had been discontinued for nonpayment of rent. It is not shown that he suffered any pecuniary loss by the suspension of the service, although it would seem that he was considerably annoyed about it. On these facts, the jury

found for him a verdict for \$200, on which the court entered judgment. The court instructed the jury that they should find for the plaintiff at least nominal damages, and, if they believed from the evidence he suffered inconvenience by reason of his telephone service being discontinued, then they should further find for him such sum as would fairly and reasonably compensate him for the inconvenience so sustained. There was nothing in the case to warrant an instruction on punitive damages, and the court properly refused to instruct the jury on this subject. The plaintiff had by contract acquired the right to a certain service, and, this contract being broken, the measure of damages is compensation for the breach, as in other cases of broken obligations. The case is entirely different from those where there is a physical trespass, as in the case of the expulsion of a passenger from a train, where there is not only a breach of contract but an actual tort. The proper measure of damages to compensate for the breach of the contract is a matter of some difficulty, and we have been referred to no authorities directly in point. Where the contract is to deliver a specific message, and is broken, the measure of damages has been often adjudicated, and we see no reason why the same principles should not apply to the case before us, for the contract here was in substance an undertaking to convey all messages the subscriber might wish to send, or others might wish to send to him over appellant's line, within the time paid for by him. In the absence of proof of special damage for the failure to carry a message, the recovery would be limited to the amount paid for the service which was not furnished. Mere inconvenience or annoyance can not be recovered for except in peculiar cases. 25 Am. & Eng. Ency. Law, 855-863; Chapman v. Telegraph Co., 90 Ky., 265, 12 R., 265, 13 S.

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W., 880. Where there is a contract, not for a specific message, but for the carriage of all messages within a certain time, the refusal to carry any messages for a certain part of the time is a breach of contract not different in character from the neglect to carry a specific message, and the measure of damages, in the absence of any proof of specific loss, is the amount paid for the service for the time during which it is refused. In case of special damage, this, in addition, may be recovered under proper averments. *Robinson v. Telegraph Co.* (24 R., 452) 68 S. W., 656, 57 L. R. A., 611. Under the evidence, the court should have instructed the jury to find for the plaintiff the amount paid by him for the service for the time his 'phone was discontinued, taking for the basis the amount paid by the month, and allowing for the time lost such part thereof as they deemed right.

Judgment reversed, and cause remanded for further proceedings consistent herewith. *

CASE 54—ACTION BY B. F. WILSON v. J. F. TOWNSEND, &c. TO SUBJECT TO CLAIMS OF CREDITORS, PROPERTY CONVEYED BY VOLUNTARY DEED.—JAN. 7.

Townsend, &c. v. Wilson, &c.

APPEAL FROM FAYETTE CIRCUIT COURT.

JUDGMENT FOR PLAINTIFFS AND DEFENDANTS APPEAL. AFFIRMED.

VOLUNTARY CONVEYANCE—CREDITORS—ACTION TO SET ASIDE—DEFENSES—EVIDENCE—TRANSACTION WITH DECEDENT.

Held: 1. Under Kentucky Statutes, section 1907, providing that "every conveyance made by a debtor of any of his estate without valuable consideration therefor shall be void as to all his then existing liabilities" in an action to subject property conveyed by a debtor in consideration of love and affection to the payment

of a liability existing at the time of the conveyance, the fact that at that time he had other property subject to execution, more than sufficient to pay his debts, constituted no defense.

2. Under Civ. Code, section 606, providing that "no person shall testify for himself concerning any verbal statements of or any transactions with or any act done by one who is dead when the testimony is offered," in an action to subject land to the payment of debts of the grantor, where the conveyance, stating the consideration as love and affection, conveyed the property to two children, and, if they died without issue and before reaching majority, then to the mother, she was incompetent to testify to any transaction with deceased, to show that the conveyance was not voluntary.

BUTLER T. SOUTHGATE, FOR APPELLANTS. •

STATEMENT AND AUTHORITIES.

Isaac Wilson died in 1863, and, under his will, John N. Wilson took a legacy of \$1,000 with the condition that if he should die without children, the legacy should then pass to the other heirs of Isaac Wilson. John N. Wilson died in 1896 without children. The heirs of Isaac Wilson obtained a judgment against J. N. Wilson's executrix for the amount of the legacy, and upon that judgment an execution was issued, and there was a return of "*nulla bona*."

This action is upon that return, and seeks to subject to the judgment debt certain property conveyed by John N. Wilson to the infant children of his adopted daughter, in February, 1889, for a recited consideration of love and affection, upon the ground that the conveyance was voluntary and therefore void as against that judgment debt.

The guardian *ad litem* answers in three paragraphs; the first alleging a valuable consideration for the conveyance; and the second setting up the fact that at the time of the conveyance Wilson was practically free from debt, except for the plaintiff's claim, and had in money and property besides that conveyed to the Townsends, more than twice the amount of all his debts, including that to the plaintiffs, and that at the time of his death, when his liability to the plaintiff became fixed, his estate was worth an amount largely in excess of all his obligations. The third paragraph pleads a release and abandonment by R. A. Wilson on his part of the claim upon which the plaintiffs' judgment is founded. The circuit court sustained demurrers to the second and third defenses, and the infant defendants excepted. Upon the issue made by the first paragraph in which it is alleged that the conveyance was made for valuable considera-

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tion, proof was taken, and, upon a final hearing, a judgment was entered in accordance with the prayer of the petition. From that judgment, the defendants appeal to this court.

We desire to present our argument and authorities upon the points involved in the following order.

1. Even if the conveyance was voluntary, under the allegations of the second paragraph of the answer, it was good as against plaintiff's claim.

2. R. A. Willson released and abandoned his interest in the plaintiffs' claim.

3. The conveyance was not voluntary, but was made for a fully adequate valuable consideration.

AUTHORITIES CITED.

1. Bump on Fraudulent Conveyances, 289, 248; Taylor v. Eubanks, 3 A. K. Marshall, 241; Lyne v. Bank of Ky., 5 J. Marshall, 555; Story's Equity Juris., vol 1, sec. 365; Harting v. Jockers, 136 Am. St. Rep., 342-136 Ill.; Tiedman's Real Property, sec. 802; Jones on Real Property, vol 1, secs. 288, 292; Fulp v. Beaver, 36 N. E. Rep., 250.

2. As to competency of witness. Civil Code, sec. 606, subsec. 2, subdiv. "C;" Perine v. Gr. Lodge, 48 Min., 82, 50 N. W. Rep., 1022; Wormsley v. Hamburg, 40 Iowa, 22; Zeibe v. Reigart, 42 Iowa, 229; Jones on Evidence, vol. 3, sec. 791; Underhill on Evidence, sec. 310; Stowers v. Hollis, 83 Ky., 544; Connolly v. O'Connor, 117 N. Y., 91; Eisenlord v. Clum, 126 N. Y., 552; Cunningham's Admr. v. Speagle, 20 Ky. Law Rep., 1836; Hankey v. Dawney, 38 N. E. Rep., 220 (10 Ind. App., 500); Wooters v. Hale, 83 Texas, 563, 19 S. W. Rep., 134; Brantly v. Mayo, 7 S. E. Rep., 137; Gerz v. Weber, 151 Penn. St., 396; Latourette v. McKean, 62 N. W. Rep., 153; Cooper v. Jackson, 22 Ky. Law Rep., 295; Joss v. Mahone, 55 New Jer. Law, 407, 26 Atl. Rep., 987; Davis v. Davis, 26 Cal., 23, 85 Am. Dec., 157; Kisling v. Shaw, 33 Cal., 425 (91 Am. Dec., 644); Flood v. Pragroff, 79 Ky., 616.

BRECKINRIDGE & SHELBY, FOR APPELLEES.

POINTS AND AUTHORITIES.

1. A voluntary conveyance is void as to the pre-existing debts of the grantor without reference to his pecuniary condition at the time. Kentucky Statutes, section 1907; Reade v. Livingston, 3 John. Ch., 492-501; Hanson v. Buckner, 4 Dana, 254; Enders v. Williams, 1 Met., 350; Yankey v. Sweeney, 85 Ky. 62.

2. A person, whether he be a party to an action or not, is incompetent to testify in his own behalf concerning any ver-

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bal statement of, or transaction with, or act done or omitted to be done by, one who is dead when the testimony is offered to be given, whether such testimony be either against the estate of the decedent, or against some one else. Civil Code, sec. 606, sub-sec. 2; Act of 1872 (Gen. Stats., ch. 37, sec. 25); Harpending's Exors. v. Daniel, 80 Ky., 452; Hurry v. Kline, 93 Id., 358; Hagins v. Arnett, 23 Ky. Law Rep., 809; Manhattan Life Insurance Co. v. Beard Id., 1747; Hobbs v. Russell, 79 Ky., 62.

3. Even if it were competent, the testimony of Mrs. Townsend, who is clearly interested for herself and her children, is insufficient, standing alone, to overcome the presumption arising from the recitals of the deed that the conveyance was a purely voluntary one.

JOHN B. JAMES, FOR APPELLEE.

POINTS AND AUTHORITIES.

1. A conveyance not supported by a full consideration is voluntary as to the excess so far as it affects creditors. Lillard v. McGee, 4 Bibb, 165; Hord v. Rust, 4 Bibb, 231 446; Ward v. Trotter, 3 Mon., 1; Zoder v. Steindipend, 7 Mon., 478; Black v. Jones, 1 A. K. Mar., 312; Petty v. Petty, 4 B. M., 215; Leach v. Duvall, 8 Bush, 201; Trimble v. Ratcliffe, 9 B. M., 511; Hawkins v. Moffitt, 10 B. M., 81; Smead v. Williamson, 16 B. M., 492; Bibb v. Baker, 17 B. M., 292; Short v. Tinsley, 1 Met., 397; Whittaker v. Garnett, 3 Bush, 402; Wood v. Goff, 7 Bush, 59; Foster v. Grigsby, 1 Bush, 86; Slater v. Sherman, 5 Bush, 206; Todd v. Hartley, 2 Met., 206; Earle v. Couch, 3 Met., 450; Hundt v. Courtenay, 4 Met., 139; Dehoney v. Dehoney, 7 Bush, 217; Hure & Wallace's American Leading Cases, vol 1, p. 63.

2. Parol testimony can not be introduced to contradict a writing unless fraud or mistake be pleaded. Thompson v. Buchanan, 2 J. J. Mar., 420; Allen v. Luckett, 3 J. J. Mar., 167.

OPINION OF THE COURT BY JUDGE HOBSON—AFFIRMING.

Isaac Wilson died in 1863, and by his will devised to John N. Wilson \$1,000, on the conditions that, if he should die without children, the legacy should then pass to the other heirs of Isaac Wilson. John N. Wilson died without children in 1896. The residuary legatees of Isaac Wilson obtained a judgment against John N. Wilson's executrix for the amount of the legacy, and upon that judgment an

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execution was issued, and returned, "No property found." They then instituted this action to set aside, as fraudulent as against them, a deed made by John N. Wilson in the year 1889 for the property in controversy, upon the recited consideration of love and affection, to appellants, Jennie F. Townsend and her two children, Elizabeth and John W. Townsend, on the ground that the conveyance was voluntary, and therefore void as against their judgment debt. By the terms of the deed the property was conveyed to the two children, and, if either died under 21 years of age without issue, the interest of the one so dying passed to the survivor, and, if both died under 21 and without issue, the property passed to their mother, Jennie F. Townsend.

The defendants pleaded, in substance, that the deed was not fraudulent in fact, and that John N. Wilson, after he made the deed, had other property, subject to execution, more than sufficient to pay his debts. The court sustained a demurrer to this plea. While there is some conflict in the authorities, the rule in this State has been from the beginning that, if a party be indebted at the time of a voluntary conveyance, it is presumed to be fraudulent as to his existing debts, regardless of the amount of the debts, the intentions or circumstances of the party conveying, or the amount of property conveyed. *Hanson v. Buckner's Ex'r*, 34 Ky., 251, 29 Am. Dec., 401. This rule has been crystallized in our present statute, which provides: "Every gift, conveyance, assignment, transfer or charge made by a debtor of or upon any of his estate without valuable consideration therefor shall be void as to all his then existing liabilities." Kentucky Statutes, section 1907. As to existing liabilities, by the express terms of the statute, every voluntary conveyance by a debtor of any of his estate is void. The purpose of the statute is to place the

property of the debtor which is thus conveyed away in precisely the same situation as to his existing debts as if the conveyance had not been made. As to these debts, and as against the original grantee, the conveyance is a nullity. *Enders v. Williams*, 58 Ky., 350; *Slater v. Sherman*, 68 Ky., 206; *Yankey v. Sweeney*, 85 Ky., 62, 8 R., 945, 2 S. W., 559. The court therefore properly sustained the demurrer to this part of the answer.

The defendants also pleaded that the deed was not made in consideration of love and affection, but for a valuable consideration, and in support of this plea the mother, Jennie Townsend, was introduced as a witness; but the court sustained exceptions to her testimony in so far as she stated transactions between her and the decedent, J. N. Wilson, on the ground that she was testifying for herself. She was a party defendant to the action, and, in the event that her two children died in infancy and without issue, took the property in fee under the deed in controversy. She had, therefore, a vested interest in the property, although it was defeasible upon the children, or either of them, surviving their majority or leaving issue. But although her interest might thus be defeated, she had a certain interest in the property, and was thus testifying for herself. While there are cases in other States allowing the testimony of a party in interest as to a transaction with a decedent where the controversy is wholly with strangers, little weight can be given to such decisions, for the question must depend upon the language of the statute, and our statute is different from that in many other States. It provides, subject to certain exceptions that need not be noticed, that "no person shall testify for himself concerning any verbal statement of or any transaction with or any act done or omitted to be done by . . . one

. . . who is dead when the testimony is offered to be given." Civ. Code, section 606. As we have said, Mrs. Townsend was testifying for herself. She testified concerning a transaction with J. N. Wilson, who was dead when the testimony was offered to be given. The original statute allowing parties to testify for themselves read very differently. See original General Statutes. The purpose of the change appears to have been not only to exclude the testimony of a party as to a transaction with a decedent "in actions or special proceedings with the executor, administrator," etc., as provided in the original statute, but in all actions where the person with whom the transaction occurred is dead, and can not be introduced to contradict the testimony of the interested party. Thus, in Harpending's Exr's v. Daniel, 80 Ky., 452, 4 R., 330, where a transaction had taken place with an agent who was dead at the time of the trial, it was held that the defendant could not testify for himself as to the transaction with the agent, although his estate was in no wise concerned. See, also, Maxey v. Bethel, 23 R., 1085. 64 S. W., 746. So, also, in Hurry v. Kline, 93 Ky., 358, 14 R., 330, 20 S. W., 277, the defendant was not allowed to testify as to what took place between him and the obligee in the note where the suit was by the assignee, although the estate of the assignor was not liable upon the assignment. In Turner v. Mitchell (22 R., 1784) 61 S. W., 468, the plaintiff sought to recover upon the ground that one of several sureties in the note had first taken an assignment of the note to himself, and then assigned one-half of it to the plaintiff. The surety was dead at the time of the trial, and it was held that the plaintiff could not testify as against a co-surety to the transaction between him and the dead man. The same rule was recognized in Hagins

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v. Arnett (23 R., 809) 64 S. W., 430; Insurance Co. v. Beard (23 R., 1747) 66 S. W., 35. Aside from the statute, the parties in interest can not testify at all. The Legislature, in changing the rule, and allowing them to testify as to their acts and doings, has seen fit to except, among other things, transactions with deceased persons, for the reason that, if such testimony of a party in interest were allowed, it would place his adversary at great disadvantage, because of the difficulty in meeting it after the death of the person with whom the transaction was had; and, besides, the temptation to perjury and undue advantage would be given one of the litigants. The circuit court therefore properly excluded the evidence referred to, and, as without this there was nothing to impeach the recitals of the deed, properly subjected the land to the debt.

Judgment affirmed.

Petition for rehearing by appellant overruled.

**CASE 55—ACTION BY COMMONWEALTH FOR USE OF NICHOLAS COUNTY
v. S. F. STONE AND OTHERS, SURETIES ON THE OFFICIAL BOND
OF THE SHERIFF TO RECOVER MONEY COLLECTED UNDER A VOID
LEVY.—JAN. 13.**

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v. Stone and Others.**

APPEAL FROM NICHOLAS CIRCUIT COURT.

JUDGMENT FOR DEFENDANTS AND PLAINTIFF APPEALS. AFFIRMED.

SHERIFF—BOND—SURETIES—TAX—CONSTITUTIONAL LIMIT—EXCESS.

Held: 1. Where a county levied and the sheriff collected a tax for county purposes in excess of the constitutional limit, the sureties on his general official bond, conditioned as required by Kentucky Statutes, section 4556, that he shall "well and truly discharge all the duties of said office, and pay over to such

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124	476
114	511
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persons, at such times as they may be respectively entitled thereto, all money that may come into his hands as sheriff," are not liable for such excess of tax collected.

WINFIELD BUCKLER, FOR APPELLANTS.

POINTS AND AUTHORITIES.

The sureties on the bond sued on are liable for *the wrong* committed by both the sheriff and his deputy *for the wrongful collection* of money under tax process. Kentucky Statutes, sec. 4141; Johnson, &c. v. Williams' Admr., 23 Ky. Law Rep., 658; Munfree on Sheriffs, sec. 60; State v. Shacklett, 5 Am. Law Register, 664; Shields v. Pfang, 101 Ky., 407; Freeman on Executions, vol 2, 254; Com. for Use v. Stockton, 5 Mon., 193; Am. & Eng. Ency., vol. 25, (1st ed) 466, "note;" Mechem on Public Officers, sec. 285; Clancy v. Lenworthy, 74 Iowa, 743; Am. & Eng. Ency., vol. 25, (1st ed) 478.

2. The sureties of a sheriff are liable for taxes *actually collected* under void process *and not paid over*. Throop on Public Officers, secs. 289, 290, 220; Cooley on Taxation, secs. 705, 708; Pingree on Suretyship & Guarantee, secs. 337, 310; Mechem on Public Officers, sec. 694; Am. & Eng. Ency. of Law, vol. 24, 894, 879; Webb Co. v. Gonzules, &c., 6 S. W. Rep., 782; Palmer v. Craddock Hugh (1st Ky.), 183; Inhabitant of Orono v. Wedgewood, 69 Am. Dic., 82.

ADDITIONAL AUTHORITIES CITED FOR APPELLANT.

1. Blair v. Carlisle J. T. Co., 4 Bush, 157; Com. for Use v. Scott, &c., 23 R., 1s490; Kentucky Statutes, sec. 4556, 1715; Howard v. Com., 104 Ky., 492; Pingree on Suretyship & Guarantee, sec. 337; Mechem on Public Officers, sec. 694; State v. Shacklett, 5 Am. Law Reg., 168; Am. & Eng. Ency., vol. 24, 894; Ency. of Pleading & Practice, vol. 15, 154.

2. Freeman on Executions, vols. 1, 100-102; Bouvier's Just., vol. 3, 564; Mechem on Public Officers, secs. 767, 772; Am. & Eng. Ency. of Law, vols. 25, 478; Munfree on Sheriffs, sec. 68; Croker on Sheriffs, sec. 864; Anderson v. Thompson, 10 Bush, 135.

JOHN I. WILLIAMSON, FOR APPELLEES.

POINTS AND AUTHORITIES.

1. The sureties upon the sheriff's bond are bound only by the acts of the sheriff done by virtue of his office, and the petition in this case discloses that the acts here complained of, being done under void process, were not done by the sheriff by virtue of his office. Whaley, &c v. Commonwealth, for Use, &c.,

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23 Ky. Law Rep., 1292; Governor v. Perrine, 23 Ala., 807; State v. Mann., 21 Wisc., 692; Turner v. Collier, 4 Heiskell, 89; Fitzpatrick v. Branch Bank, 14 Ala., 533; Dean v. Governor, 13 Ala., 526; Forward v. Marsh, 18 Ala. 645; Thomas v. Browder, 33 Tex., 783; Gerber v. Ackley, 37 Wisc., 43, 19 Am. Rep., 751; Marquess v. Willard, 12 Wash., 528, 50 Am. St. Rep., 906; Allison v. People, 6 Col. Appeals, 80; McLenden v. State, 92 Tenn., 520; Brown v. Weaver, 76 Miss., 7, 71 Am. St. Rep., 512 Poin-dexter v. Greenhow, 114 U. S., 282; Cooley on Taxation, 2d ed., 712; Leggett v. Humphreys, 21 Howard, 66; Holiman v. Carroll's Admr., 27 Tex., 23; People v. Schuyler, 4 N. Y., 173; State v. McDonnough, 9 Mo. App., 63; State v. Wade, 87 Md., 544; State v. Moore, (Neb.) 77 N. W. Rep., 474; Eaton v. Kelly, 72 N. C., 110; Hawkins v. Thomas, 3 Ind. App., 399; Chandler v. Rutherford, 101 Fed. Rep., 774.

2. Of two innocent parties he whose negligence made the loss possible must bear the loss. And the loss, if any, in this case is due to the negligence of the tax-payers in paying a void levy.

CHAS. W. WOOD, FOR APPELLEES.

POINTS AND AUTHORITIES.

The sureties on an official bond of a sheriff are not liable for an unconstitutional tax collected by the sheriff and said tax is not covered by the undertakings of the sheriff's sureties on his bond

AUTHORITIES CITED.

Hawkins v. Commonwealth, 1 T. B. Monroe, 146; Brown v. Commonwealth, 6 J. J. Marshall, 636; Commonwealth for Arnold v. Summers, 3 Bush, 55; Mercer County v. Gabbard, Admr., 5 Bush, 438; Griffith v. Commonwealth for Use, &c., 10 Bush, 234-5; Hughes v. Cotton, 13 Bush, 600; Dawson v. Lee and Lee v. Hill, 83 Ky., 55; Hammond v. Crawford, 72 Ky., 76; Greenwell v. Commonwealth for Use, &c., 78 Ky., 320; Osenton's Admr. v. Burnett, 19 Ky. Law Rep., 610; H. Whaley, &c. v. Commonwealth, 23 Ky. Law Rep., 1292-1306.

OPINION OF THE COURT BY CHIEF JUSTICE BURNAM—AFFIRMING.

The fiscal court of Nicholas county in 1897 leved a tax of 59 cents on the \$100 for county purposes—9 cents in excess of the constitutional limit; and the sheriff of the county, S. A. Ratcliff, collected about \$3,200 under this void levy, and this suit was instituted against the sureties

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upon his general official bond to recover the amount so collected. The only difference between this case and the case of *Whaley v. Com.* (110 Ky., 154) (23 R., 1292) (61 S. W., 35), is that that suit was on the revenue bond required by section 4133 of the Kentucky Statutes, which reads: "We, A. B. sheriff, and C. D. and E. F. his sureties bind and obligate ourselves, jointly and severally to the Commonwealth of Kentucky that said A. B., sheriff, shall faithfully perform his duties." Whilst this is upon what is generally termed the sheriff's general official bond, required by section 4556 of the Kentucky Statutes, and reads as follows: "We, A. B., the principal, and C. D. and E. F., sureties, hereby covenant to and with the Commonwealth of Kentucky that said A. B. of — county shall by himself and deputies well and truly discharge all the duties of said office, and pay over to such persons, at such times as they may be respectively entitled thereto, all money that may come into his or their hands as sheriff." In both cases the plaintiff sought to recover of the sureties the same fund, and upon the same grounds, and to support their contention substantially the same argument is made and the same authorities relied on in this case as in that. The case is not entirely free from difficulty, as respectable authorities have been found to support appellant's contention, but we concluded in the *Whaley* case that the best line of reasoning and the preponderance of the authorities supported the conclusion there reached. As the opinion in that case contains a full statement of the facts and reasons for our conclusion, and the court has determined to stand by the opinion delivered in that case, it is unnecessary to repeat them in detail in this proceeding. The responsibility of the sureties must be measured by the terms of the bond as made out on strict construction. In *Osenton's*

Adm'x v. Burnett (19 R., 610) 41 S. W., 270, it was held that, where a county court had levied a tax to satisfy a judgment against the county, and appointed a collector to collect it, and required a bond therefor with sureties, the sureties were not liable for the excess of money collected beyond the satisfaction of the debt named in the order requiring the bond. The court said: "The liability of the securities in an official bond is measured by its terms. The reasonable and fair construction of the terms of this bond is to confine the liability of the sureties to the work required of Burnett in collecting sufficient funds to pay the judgment and cost of proceeding. If the collector in fact collected more than was sufficient for that purpose, or might have done so with reasonable effort, he may be liable to the county, but not to the securities." There is no question about the liability of the sheriff for the funds collected by him, but the question now to be determined is as to the liability of the sureties, and whether there is such a difference in the covenant of the two bonds quoted *supra* as would make the sureties liable for the illegal act of the principal in the one case, and not in the other. It was held in *Howard v. Com.* (105 Ky., 604) (20 R., 1411) 49 S. W., 466, *Pulaski Co. v. Watson* (106 Ky., 500) (21 R., 61) 50 S. W., 861; *Catron v. Com.* (21 R., 650) 52 S. W., 929, and *Adair v. Bank* (21 R., 934) 53 S. W., 295, that, where a sheriff executed the bond required by section 4133, the sureties thereon were liable not only for the State revenue, but also for the county levy; that all these bonds were intended to cover substantially the same liabilities, and were cumulative in character, and, so far as we are able to discover, the obligation of the sureties in each of them is substantially the same. As said in *Whalley v. Com.*: "They covenant that their principal shall

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perform every act which the law required of him as such official to perform; and that, if he fails to do that which he is required by law to do in the discharge of his official duty, they will answer for such default. But no act prohibited by the Constitution can ever become a duty." We therefore conclude that the sheriff's liability for the funds sued for is not covered by the undertaking of his sureties in the bond sued on in the proceeding, and no recovery can be had, and that the chancellor properly sustained the demurrer.

Judgment affirmed.

Petition for rehearing by appellant overruled.

CASE 56—ACTION BY A. S. FERGUSON V. SECOND NATIONAL BANK OF ASHLAND TO RECOVER FOR NOTARIAL FEES, PLAINTIFF BEING CASHIER OF SAID BANK.—JAN. 13.

Second Nat. Bank of Ashland v. Ferguson.

APPEAL FROM BOYD CIRCUIT COURT.

JUDGMENT FOR PLAINTIFF AND DEFENDANT APPEALS. REVERSED.

NOTARIES—FEES—CONTRACT FOR SERVICES—INCLUSION OF FEES—LEGALITY—ESTOPPEL.

- Held: 1. A bank clerk by the contract of hiring was to receive fifty dollars per month for his services, including notarial fees, and after receiving such compensation he sued for his notarial fees, which did not amount to fifty dollars per month, on the ground that a contract by a public officer to accept less than his legal fees is illegal. HELD, that the contract having been understood, and the lump sum accepted being greater than the fees, there was no contravention of public policy.
2. Plaintiff having received and retained the fifty dollars per month in satisfaction of his services, and having remained in the employment, he was estopped from demanding further compensation.

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HAGER & STEWART, FOR APPELLANT.

POINTS DISCUSSED AND AUTHORITIES.

The verdict is flagrantly against the evidence and new trial should be granted because the jury did not find for appellant under instruction No. 2.

No one can use a void contract as a means of getting better terms than he could have claimed under it.

One who makes a contract vicious and invalid as against public policy in respect of his legal fees for services to be rendered, can not, after rendition of the services disregard the contract and recover reasonable value of the services, nor the value fixed by law. *Willieimin against Bateson*, 63 Michigan 309; *Myers v. Meinrath*, 101 Mass., 366 (3 Am. Rep., 368); *Anderson v. Meredith's Administrator*, 82 Ky., 565.

It is the duty of the court at once to arrest trial of the case and dismiss the plaintiff from court whenever it is disclosed in any manner, whether with or without pleadings, that his cause of action rests upon, or is connected with, a contract void as against public policy. *Patterson v. Hamilton*, 19 Ky. Law Rep., 825; *Oscanyan v. Winchester Repeating Arms Co.*, 103 U. S. 274.

PROCTOR K. MALIN, FOR APPELLEE.

QUESTIONS DISCUSSED AND AUTHORITIES CITED.

1. The verdict is supported by the evidence and the jury were justified in finding for appellee under instruction No 1.

2. Instructions offered by appellant were properly refused by the court.

3. The assignment by a public officer of his unearned fees is void, and an answer to a petition for the recovery of such fees pleading such assignment presents no defense. *Holt v. Thurman, &c.*, 23 Ky. Law Rep., 82; *Meachem on Public Officers*, sec. 47; *State of Nevada, ex rel. v. Summerfield, &c.*, 18 L. R. A., 213; *People of the State of New York v. William F. Rathbone*, 145, N. Y., 434.

4. Unless the party requires aid from an illegal contract to establish his case, such illegal contract can not be relied upon as a bar to a recovery. *Ohio National Bank of Washington v. Hopkins*, (8 App. D. of C., 146); *Phelan v. Clark*, 19 Conn., 421; *Insurance Company v. Huil*, 51 Ohio State, 470; *Armstrong v. American Exchange*, 133 U. S., 469.

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OPINION OF THE COURT BY JUDGE HOBSON—REVERSING.

For several years previous to July 18, 1893, appellee was individual bookkeeper for appellant at a salary of \$50 a month. He was also a notary public, and received the fees for making protests. On that day the bank reduced the salary of all its officers, and by a resolution of the directors it was provided that "the salary of the individual bookkeeper be fixed at the rate of \$600 per annum, and he shall make all protests free of charge." Immediately after the adjournment of the board, he was notified of its action, and went to see them. All of the directors but two had left. These told him, in substance, that this was the best they could do, and that, if he did not want the place at that, they could get some one else for less. He then left, and the next morning early came down to the bank and told the president that he had had a talk with his father, who was also one of the directors, and had a proposition to make to him; that he would come back and work for the salary of \$50 a month, provided the bank would give him \$10 a month for notarial fees. The president said: "You know I can't do anything of that kind. You will have to see the directors about it." Appellant replied: "Whatever you say to the directors goes, and, if you say that you will see that I get this, I will go to work." The president said: "That is all right. You were not asking too much, anyhow." At the next meeting of the directors, appellee asked the president if he had brought the matter before them, and he said, "No," he had forgotten it. Nothing more was said about the matter, and appellee drew his salary of \$50 monthly, making no charge for notarial fees, and no demand of the money. He left the service of the bank in February, 1896, and in September, 1898, filed this suit against it to recover \$754.50, the

amount of his notarial fees between July 18, 1893, and the time he left the bank. In the circuit court he recovered judgment, and the bank appeals.

The above are the facts as shown by appellee's own testimony. There is little controversy in the proof, the only difference being as to the conversation between him and the president the next morning, the president stating that he agreed simply to refer the matter to the directors; but we do not regard this as material. Appellee knew very well that the board of directors were the proper authorities to fix the salaries of the officers of the bank. He knew that they had fixed his salary at \$50 a month, including notarial fees, and he also knew that the president of the bank had no authority to make any contract with him not warranted by the action of the board of directors. He does not, therefore, sue for the \$10 a month, or base any claim upon what took place between him and the president of the bank. His counsel rests his right to recover on the ground that a contract by a public officer to receive less for his official services than the charges authorized by law, or to discharge his duties gratuitously, is contrary to public policy and void, and therefore appellee is entitled to recover the legal fees for his services as notary public. When appellee remained in the bank after the board of directors had by resolution fixed his salary, and received month after month from it the amount of salary thus fixed by the board, without demanding more or asserting any claim for other compensation for his services, he must be conclusively held to have rendered the services on the terms proposed by the board, and to have accepted those terms. When at the end of each month the \$50 was paid to him, it was paid not only in satisfaction of his services as bookkeeper, but also in

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satisfaction of his services as notary public. His fees as notary public were then earned, and he knew the amount of them. The agreement beforehand to commute his fees as notary public, or to assign them to the bank, was not binding on him. *Bank v. Hopkins*, 8 App. D. C., 146. But when, after the services had been rendered and the fees earned, he accepted a gross sum in satisfaction of his fees, and as compensation for his work as bookkeeper, a different question is presented. For he had a right to assign to the bank or to anybody else his fees for services already rendered. *Field v. Chipley*, 79 Ky., 260, 42 Am. Rep., 215. The case of *Holt v. Thurman* (111 Ky., 84) (23 R., 92) 63 S. W., 280, was the case of the assignment of unearned fees or salary. If at the end of any month he had refused to accept the \$50, and had demanded his fees, on the ground that his legal fees as notary public were more than \$50, the contract referred to would have been no bar to a recovery of these fees, for the reason that a contract in advance by a public officer to take less than the legal fees for his services can not be enforced. 15 Am. & Eng. Ency. Law (2d Ed.), 965. But when he accepted the \$50 each month in full of his services as bookkeeper, and also of his fees as notary, he can no more maintain an action for his fees as notary than for his services as bookkeeper, for one has been paid just as truly as the other. The \$50 a month was not paid him alone for his services as bookkeeper. It was paid him in satisfaction not only of these services, but also of his services as notary public, and was accepted by him as such, for he made no demand of anything more until after he left the service of the bank; and before July 18, 1893, his notarial fees were paid along as the work was done, and when, after this, they were not paid in this way, he was bound

to know that the \$50 was paid in satisfaction of these fees, as well as his salary as bookkeeper. The court can not inquire what part of the \$50 was paid on one account or the other, for in this we have nothing to guide us. We can not say the \$50 was paid for appellee's services as bookkeeper, for that is not the fact. The acceptance of a lumping sum, covering both his official fees and his personal services, contravenes no public policy, when the sum so accepted is greater than the fees, and the arrangement is fair and fully understood. The claim for fees, having been satisfied by the monthly payments of \$50, can not now be sued upon. He who accepts monthly for his services the money of another, knowing that it is paid in satisfaction thereof, will be estopped, after thus remaining in the employment, to demand greater pay for his services. *City of Lexington v. Rennick*, 105 Ky., 779 (20 R., 1609) (20 R., 1924) 49 S. W., 787, 50 S. W., 1106. The facts of this case illustrate the justice of this rule, for the bank, acting on the idea that it did not have to pay these notarial fees, failed to collect something like three-fourths of them from its customers; and, if appellee is now allowed to recover, a loss will be thrown upon it, without remedy. On the undisputed facts shown by the evidence, the court should have peremptorily instructed the jury to find for the defendant.

Judgment reversed, and cause remanded for further proceedings consistent with this opinion.

Petition for rehearing by appellee overruled.

Boreing v. Boreing.

CASE 57—ACTION BY SARAH R. BOREING V. VINCENT BOREING FOR DIVORCE AND ALIMONY.—JAN. 18.

Boreing v. Boreing.

APPEAL FROM LAUREL CIRCUIT COURT.

FROM SO MUCH OF A DECREE OF DIVORCE AS REFUSED TO ALLOW PLAINTIFF MAINTENANCE OR ALIMONY, SHE APPEALS. REVERSED.

DIVORCE—FIVE YEARS' SEPARATION—DOMICILE OF WIFE—COMPETENCY OF WIFE AS WITNESS—ALIMONY—PLEADING.

Held: 1. If, in an action by a wife for divorce on the ground of five years' separation, it is necessary, in order to maintain her claim for alimony, that she should allege that the separation was without her fault, her omission of such allegation is cured where the defendant in his answer alleges that the separation was without his fault.

2. A wife living separate from her husband for five years does not lose her residence in the State of his domicile, for the purpose of an action for divorce, by going into other States to teach and do other work in order to support herself.
3. A wife is not competent to testify in an action brought by her for divorce.
4. A wife suing for divorce on the ground of five years' separation was justified in leaving her husband, though he had used no physical violence towards her, and had never stinted her in money matters, where it appeared that his conduct towards her had become so rude and negligent as to make it apparent that she had lost his love and affection, that he was habitually rude to her lady visitors, that he often left home to be gone for several weeks at a time, without ever informing her of his proposed departure, etc.
5. A wife who, having left her husband on account of his indifference and neglect, obtained a divorce after five years' separation, and who was in destitute circumstances, and without means of support, was entitled to reasonable alimony.

WILLIAM R. RAMSEY, FOR APPELLANT.

POINTS AND AUTHORITIES CITED.

1. Appellant entitled to divorce. Kentucky Statutes, sec. 2117; Newsome v. Newsome, 95 Ky., 393; Clark v. Clark, 21

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R., 955; *Irwin v. Irwin*, 20 R., 1764; *Lacey v. Lacey*, 95 Ky., 110.

2. As to letter of appellee preparing defense to suit. *Fishli v. Fishli*, 2 Littell, 341.

3. Appellant entitled to attorney's fee, taxed as costs. Kentucky Statutes, sec. 900; *Dugan v. Dugan*, 1 Duvall, 284; *Ballard v. Caperton*, 2 Met., 412; *Meyer v. Meyer*, 3 Met., 273; *Williams v. Monroe*, 18 B. M., 410; *Callender v. Callender*, 15 R., 64; *Turner v. Turner*, 23 R., 372.

4. Fixing fee without hearing proof is error. *Whitney v. Whitney*, 7 Bush, 520; *Schneider v. Schneider*, 23 R., 1154.

5. Appellant entitled to alimony during pendency of suit. Kentucky Statutes, sec. 2122; *Whitsell v. Whitsell*, 8 B. M., 50; *Caskey v. Caskey*, 1 R., 280; *Cravens v. Cravens*, 4 Bush, 435; *Lochnane v. Lochnane*, 78 Ky., 467.

6. Appellant entitled to permanent alimony. Kentucky Statutes, sec. 2122; *Wilmore v. Wilmore*, 15 B. M., 49; *Hoagland v. Hoagland*, 10 R., 241; *Newsome v. Newsome*, 95 Ky., 393; *Hulett v. Hulett*, 80 Ky., 364.

7. Not necessary that actual physical or threatened violence be shown. *Rice v. Rice*, 6 Indiana, 100; *Carpenter v. Carpenter*, 30 Kansas, 744; *Avery v. Avery*, 33 Kansas, 1; *Warner v. Warner*, 54 Mich., 492; *Irwin v. Irwin*, 96 Ky., 318; *Shrock v. Shrock*, 4 Bush, 684; *Thornberry v. Thornberry*, 4 Littell, 253.

8. Wife entitled to alimony, although not entirely blameless. *Griffin v. Griffin*, 8 B. M., 120.

9. Wife entitled to alimony where she is blameless, in one case one-half, and in other one-third of husband's estate. *Quisenberry v. Quisenberry*, 1 Duvall, 198; *Thornberry v. Thornberry*, 4 Littell, 253.

10. When husband in fault, alimony allowed wife. *Canine v. Canine*, 13 R., 124; *Davis v. Davis*, 86 Ky., 32.

11. When both husband and wife in fault, alimony allowed. *Edwards v. Edwards*, 84 Ala., 361; *Russell v. Russell*, 17 R., 798; *Pore v. Pore*, 20 R., 1981.

12. When ground for divorce, five years' separation, alimony allowed. *Lacey v. Lacey*, 95 Ky., 110; *Newsome v. Newsome*, 95 Ky., 383; *Irwin v. Irwin*, 20 R., 1761.

13. Separation not required to be mutual and voluntary. Kentucky Statutes, 2117; *Davis v. Davis*, 19 R., 1520; *Ferguson v. Ferguson*, 8 R., 428; *Clark v. Clark*, 21 R., 955; *Pile v. Pile*, 94 Ky., 308.

14. Alimony an incident to divorce or may be obtained by independent action. Vol. 1 Ency. P. & P., 417; Vol. 2 Bishop, Marriage, Divorce and Separation, secs. 488, 1067; *Hulett v. Hulett*, 80 Ky., 364; *Tilton v. Tilton*, 16 R., 538.

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W. S. PRYOR, FOR APPELLANT.

Counsel for the appellee in their brief have referred to section 2122, Kentucky Statutes, that reads: "If the wife have not sufficient estate of her own she may, on a divorce obtained by her, have such allowance out of that of her husband as shall be deemed equitable, and be restored to the name she bore before her marriage if she desired it."

We are not insisting that this statute should be so construed as to give to one alimony, although there has been a separation for five years, if she has left the husband without any cause, but we do maintain that, where the husband is possessed of an estate, and the pleadings and testimony show that the wife is penniless, the court, in granting a divorce, will allow alimony to the wife, in the absence of testimony showing the fault to be on the part of the wife. In other words, where there is an absence of testimony showing the wife to be in fault, that under this statute the burden is not upon her to show that she was not in fault, nor was it necessary to so allege. The five years having elapsed the judgment for the divorce necessarily followed, but the wife, claiming alimony, and alleging her penniless condition, and the ability of the husband to maintain her, the court would inquire into the facts, to ascertain whether or not the wife left the home of the husband in order to obtain alimony, and that he was without fault.

If, as is contended, it was necessary under this five years' statute to allege that the separation was without the fault of the wife, the failure to so allege is cured by the answer of the appellee, in which it is alleged the fault was not his, but that of the wife, still it is not necessary to make any such averment, as the statute authorizes the divorce to either party where they have lived separate for five years, and alimony, being a mere incident of the divorce, the court may and will inquire into the conduct of the parties in determining the question of alimony, and in the exercise of a judicial discretion may limit the judgment to a mere question of costs, but we maintain that the discretion in this case, on the part of the chancellor, was purely arbitrary, and the husband by the decree left in affluence and wealth, with the wife absolutely in want, but for her untiring efforts to earn a support. The testimony in this case shows she is entirely blameless of any wrong.

We are not insisting on the competency of the wife's testimony, and only offered it to rebut the manufactured testimony in the shape of a letter, written by the appellee, inviting the wife to return to his home.

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The testimony of appellee's own witnesses show the appellant to have been blameless, and whilst the wife of the appellee, no family discord was ever caused by any improper conduct on her part, but as was said by this court in *Irwin v. Irwin*, 96 Ky., and it applies to this case, "The coldness and indifference on the part of appellant towards his wife, etc., bordered on a degree of cruelty that must have tended to destroy her peace of mind and render her an unhappy woman." Page 323, section 900 of the Kentucky Statutes, provides: "In actions for alimony and divorce the husband shall pay the cost of each party, unless it shall be made to appear in the action the wife is in fault, and has ample estate to pay the same."

TINSLEY & FAULKNER, FOR APPELLEE.

POINTS AND AUTHORITIES.

1. The wife was an incompetent witness and exceptions to her evidence were properly sustained. *Fight Master v. Fight Master*, 22 Ky. Law Rep., 1512.

2. Where the evidence tends to show no mistreatment on the part of the husband, but on the contrary that he always treated her well and provided for her, even though there was some evidence tending to show that she and his children did not get along well together for which he was not responsible, alimony will not be allowed. *Springer v. Springer*, 21 Rep., 1292.

3. If the wife choose without cause to live separate and apart from her husband, he should not be required to contribute to her maintenance. A trivial excuse such as he would not build a larger house, furnish no ground for her leaving him. *Woolfork v. Woolfork*, 96 Ky., 657.

4. Exhibition of temper on the part of either husband or wife, or occasional quarrels between them that would render the marriage unpleasant; or language that would pain a sensitive woman or the manners of a husband that may appear rough in contrast with those educated in the refinement of social life, although established, constitute no ground of divorce. *Beal v. Beal*, 80 Ky., 676.

5. No reasonable cause has been shown for her abandonment of her husband, and therefore, if she chooses to live separate and apart from him he should not be required to support her or contribute to her maintenance. *Lee v. Lee*, 1 Duvall, 196.

6. It is the policy of the law to impress those who enter into the marriage relation with the idea that it is to be as permanent as their lives. *Griffin v. Griffin*, 8 B. M., 121.

7. The case of *Newsome v. Newsome*, 95 Ky., 383, is not at all in point with this. If the court will examine the record in

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that case it will see the parties had lived together till all their children were raised. The wife had helped to accumulate the estate and the separation was in effect by mutual consent for five years.

T. L. EDELIN, FOR APPELLEE.

I conclude from the examination I have made of the record:

1. That the separation; that is, the continuous separation, created by Mrs. Boreing and existing in other States than Kentucky, was not a ground for a divorce upon her petition; and if not, then she was not entitled to alimony in any event.

2. Her pleadings having failed to allege that the supposititious cause of divorce had its original in the fault of the defendant, the court properly dismissed her action for alimony upon the pleadings themselves.

3. If it should be held that this position is unsound, then there is an absolute failure of proof on the part of Mrs. Boreing that the separation was the result of any fault at all on Vincent Boreing's part.

4. The testimony of Mrs. Boreing was so palpably incompetent that its injection into the record seems to have resulted from the hope that your honors would read it and be unable to disregard it in making up an opinion on the facts.

For these reasons, it seems to me that the judgment of the court below ought to be affirmed.

CITATIONS.

Civil Code, sec. 423; *Ferguson v. Ferguson*, 8 Ky. Law Rep., 428, *Pile v. Pile*, 94 Ky., 308; *Irwin v. Irwin*, 20 Ky. Law Rep., 1761; *Griffin v. Griffin*, 12 B. M., 120; *Lee v. Lee*, 1 Duv., 196; *Woolfolk v. Woolfolk*, 96 Ky., 657; *Cravens v. Cravens*, 4 Bush, 435; *Orr v. Orr*, 3 Bush, 156; *Bogus v. Bogus*, 4 Dana, 307; *Beall v. Beall*, 80 Ky., 675; *Lambert v. Lambert*, 23 Ky. Law Rep., 592; *Taylor v. Taylor* (Iowa, May 12, 1890); *Neff v. Neff*, 20 Mo. App., 183; *Alkire v. Alkire*, 33 W. Va., 517; *Martin v. Martin*, Same, 695.

CHAS. R. BROCK, FOR APPELLEE.

POINTS AND AUTHORITIES.

1. A wife can not legally testify against her husband.
2. The living apart was not mutual or voluntary, and the divorce therefore was improperly granted.
3. The living apart did not occur within the State of Kentucky, and for this reason the divorce was improperly granted.
4. If the appellant had no cause of action for alimony when

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she left the home of appellee, mere lapse of time will not and can not develop or create such cause of action.

AUTHORITIES CITED.

Civil Code of Practice, sec 606; *Fightmaster v. Fightmaster*, 22 R., 1512; *Lambert v. Lambert*, 23 R., —; *Pile v. Pile*, 94 Ky., 308; *Ferguson v. Ferguson*, 8 R., 428; *Becket v. Becket*, 17 B. M., 297; *Hall v. Hall*, 19 R., 1312; *Tipton v. Tipton*, 87 Ky., 426; *Newsome v. Newsome*, 96 Ky., 333; *Canine v. Canine*, 13 R., 124; *Lee v. Lee*, 1 Duv., 197; *Woolfolk v. Woolfolk*, 96 Ky., 657; *Springer v. Springer*, 19 R., 1292; *Kentucky Statutes*, sec. 2122; *Irwin v. Irwin*, 20 R., 1764; *Lacy v. Lacy*, 96 Ky., 113; *Davis v. Davis*, 86 Ky., 32; *Beall v. Beall*, 80 Ky., 675; *Kent's Com.*, vol. 2, p. 126; *Finley v. Finley*, 9 Dana, 52; *Barrere v. Barrere*, 4 Johnson's Chan., 187; *Logan v. Logan*, 2 B. M., 146.

OPINION OF THE COURT BY JUDGE BARKER—REVERSING.

The appellee, Vincent Boreing, and the appellant, Sarah R. Boreing, were married in Laurel county, Ky., in 1889, and lived together as man and wife until 1893, when appellant left appellee's home, and has lived separate and apart from him, without cohabitation, ever since. After leaving appellee, appellant departed from the State of Kentucky, and spent the greater part of the time intervening between said date and the time when this action was instituted in various parts of the United States, teaching school and doing clerical work in order to support herself. She finally returned to this State, and on the 23d day of February, 1901, instituted this action against her husband, praying for a divorce from the bonds of wedlock with him, upon the ground of their having lived separate and apart, without cohabitation, for five consecutive years next before the institution of the action. She further alleges in her petition, among other things, that she was without any estate or income, was out of employment or means of support, and that the appellee, her husband was the owner of a large estate, from which he derived, together with

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his avocations, a large annual income; and she prays for alimony, maintenance, and costs, including reasonable counsel fees. Upon the trial of the case below, the chancellor divorced appellant from appellee *a vinculo matrimonii*, but refused to award her either maintenance or alimony, from which latter part of the decree she is in this court on appeal.

We think the allegations of the petition are sufficient to warrant both the claims for divorce and alimony; but, if there be any weight to the contention that it was necessary, in order to maintain her claim for alimony, that she should have alleged that the separation was without her fault, it is clear that appellee's specific allegation in his answer that the separation was without his fault cured such defect.

We do not think that appellant lost her residence in Kentucky by the fact that, in order to maintain herself, she left the State; she was still the wife of appellee, and his residence was her residence, and continued to be so during all of the time that she was absent. The separation commenced in Kentucky, and, if it be necessary, in order to obtain a divorce on the grounds relied upon in this action, that her home should have been in Kentucky during the five years specified, we think that the facts in this case show that appellant had the necessary residence here

The appellant was not competent to testify in this case, and the exception to her deposition was properly sustained.

The record shows a lamentable state of affairs existing between the parties hereto. They are both people of high standing, culture and social position, and it is a matter of deep regret that their marital life should have been so

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unfortunately disrupted: Appellant is shown, by all of the evidence in this case, to be a woman of the highest education and refinement, deeply religious in her life, gentle in her manners, and considerate of all with whom she came in contact. When she went to the home of appellee as his wife, she seems to have been a happy, bright, and cheerful woman. She took up her household duties at once, and discharged them, during the time that she remained in the house of appellee, faithfully and well. All of the witnesses agree upon this, whether they have deposed for her or for her husband. The household work cast upon her was hard and onerous, and she often performed domestic labor which must have severely taxed both her strength and patience; but this record fails to show that she at any time complained of or repined at the hardness of her lot. We are not disposed to impute any blame to appellee for this state of affairs. It may have been (and he is entitled to the presumption, in the absence of evidence on that point) that there was great difficulty in obtaining household help in London, and that it was the result of his inability to obtain domestic servants that his wife had to perform the severe duties of which the witnesses speak. Perhaps we could not better illustrate her self-sacrificing fidelity to her husband's interest than by relating that the evidence shows that upon one occasion, when there was a political convention being held in London, before which her husband was a candidate for nomination, his wife left the side of her dead mother, where she was watching, in order to superintend and assist in preparing dinner at his home for the entertainment of his political friends. It does not appear that this was done at the request of appellee, and we freely acquit him of any insistence that

she should perform this work under these sad circumstances; but the fact does show how loyal she was to him, and how far she would sink her own sorrow in order to further his interest. The appellee is shown by the evidence in this case to be a man of a high order of intellect, that he possesses great energy and financial ability, and that during all of the time that he and appellant lived together he was an exceedingly busy man. He had very large interests in various enterprises. He was a speculator in timber and coal lands in Eastern Kentucky, was president of a bank, director and large stockholder in coke and coal mining companies and other large corporations, and was absent from home a large part of his time. The evidence shows that, while he was never guilty of physical violence towards the appellant, he treated her constantly with cold indifference and neglect, that he was habitually rude to her lady visitors, and that his conduct greatly humiliated and depressed her. Appellee would leave home and be gone for several weeks at a time, without having informed his wife of his proposed departure, and upon his return after such prolonged absence would greet her with as little warmth of affection as if he had returned from an absence of a few hours only. We do not believe that appellee ever stinted appellant in money matters, or that she ever lacked, by reason of his fault, anything to make her physically comfortable; but we do believe that his conduct towards her was so rude, cold, negligent as to make it apparent that she had lost his love and affection. A woman as gentle, faithful, and loyal as this record shows appellant to have been is entitled to something more from her husband than food, raiment, and shelter; and that to such a woman, living, as the wife of appellee, under the conditions shown by this record, was intolerable. This court is of opinion that appellant had the

right to leave the fireside of appellee when she found that she had lost his love, and realized that she was his wife in name only.

The evidence in this case shows that appellee himself realized that he had not treated the appellant properly, as he confessed to one of his own witnesses. It shows that appellant is destitute, and without any means of support, and we believe that she is entitled to a reasonable alimony. It is not necessary, in order to reach this conclusion, to hold that, where the wife is destitute, she is entitled to alimony without regard to whether or not the separation was the result of her fault, where the judgment of divorce is based on the five-years statute, although this court in the case of *Newsome v. Newsome*, 95 Ky., 383 (15 R., 801), 25 S. W., 878, so held. In that case it is said: "But either may sue for and obtain a divorce by simply alleging and proving the fact they had lived apart, without any cohabitation, for five consecutive years; no judicial investigation respecting cause of separation, nor inquiry as to who is in fault in meaning of the statute, being required in order to determine the right to divorce. It therefore seems to us, giving the statute a reasonable construction, that the husband is required, in a case like this, to pay the costs of each party, without inquiring whether the wife is in fault. And as it is well settled that an allowance for services of the wife's attorney, when legally authorized, may be taxed as costs, and no complaint is or could be fairly made that the amount is excessive, it was not error to make it. It seems to us equally manifest that the provision of the statute denying alimony to the wife except on a divorce obtained by her was intended to apply in that class of cases where a divorce obtained by the husband involves fault of the wife; not in cases like this, where, as either may maintain

the action, it is not a material or legitimate inquiry, in determining the right, who is in fault." It seems to us that the case at bar can not be distinguished from the case of *Irwin v. Irwin*, 96 Ky., 318 (16 R., 657) 28 S. W., 664, 30 S. W., 417, where this court, in speaking of the conduct of the husband toward the wife as constituting the basis of her right to a separation from him, say: "There never was any act of violence committed by the husband upon the wife, nor any threats of violence made; but such cruelty may be inflicted upon the wife by exhibitions of want of affection and a disregard of the marital relations as, in the results or effect on the wife, would exceed in punishment any blow that might be inflicted upon her person: .

The coldness and indifference on the part of the appellee toward his wife for several years was such as to render her life almost intolerable. And, while his conduct can not be said to be inhuman, it bordered on a degree of cruelty that must have tended to destroy her peace of mind and render her an unhappy woman. Upon the principle thus announced this court affirmed a judgment divorcing the parties *a mensa et thoro*, and awarding the wife maintenance; under this judgment the parties lived separate and apart for five years, when without new provocation upon the part of the husband, they were divorced *a vinculo matrimonii* and alimony awarded the wife. 105 Ky., 632, 20 R., 1761, 49 S. W., 432. The court in the case cited ratified and approved the wife's leaving her husband for the precise character of mistreatment of which appellant is complaining, and we think her claim is as meritorious as that of the wife in the *Irwin* case.

We are not impressed with the offer of reconciliation made by appellee. The circumstances and details of this transaction stamp it as an act of strategic diplomacy, rather

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than a proposition of reconciliation flowing from a loving and contrite heart.

In regard to the amount of the alimony to be allowed, we think that, considering the estate of appellee, the social standing of both himself and his wife, his ample fortune, and his general financial ability, there should be awarded the wife an allowance of such an amount as will, if invested with reasonable prudence, produce an income sufficient to support her comfortably, and which will not be disproportionate to appellee's fortune. The record does not show with sufficient clearness the wealth of appellee, and upon return to the court below the case should be referred to a commissioner, who should hear evidence and report to the court a lump sum to be allowed appellant as alimony, having reference to the principle in regard thereto herein enunciated.

We think the counsel for appellant should be allowed the sum of \$750 additional for their services—\$500 for their services in this court, and \$250 for their services in the court below—to be taxed as costs.

Wherefore the judgment is reversed for proceedings consistent with this opinion.

Wilson and Others v. Flanders and Others.

CASE 53.—ACTION BY W. B. FLANDERS, &c. v. JOHNSON WILSON, &c., TO RECOVER LAND SOLD UNDER EXECUTION.—JAN. 14.

Wilson and Others v. Flanders and Others.

APPEAL FROM BATH CIRCUIT COURT.

JUDGMENT DENYING DEFENDANTS' MOTION TO FILE ANSWER AND
AWARDING PLAINTIFF POSSESSION OF THE LAND AND DEFENDANTS
APPEAL. REVERSED.

EXECUTION SALE—PRIOR INCUMBRANCES—DELAY IN FILING PLEADING
—POSSESSION OF PURCHASER.

Held: 1. Where an answer to a motion, under Kentucky Statutes, section 1689, by the execution purchaser for possession of land, was not tendered until the term succeeding the motion, but an affidavit showed that respondent was between eighty-one and eighty-two years of age, and that his age and feebleness prevented an earlier offer to file the answer, refusal to permit the filing was error.

2 Kentucky Statutes, section 1689, provides that the purchaser of lands sold under execution, and not redeemed within one year, shall have the right, after obtaining a conveyance, to enter a motion, on ten days' notice, for possession of such lands. Section 1709, subsec. 1, provides that, if the lands so sold are incumbered, the purchaser at the sale shall acquire a lien for the purchase money and interest, subject to prior incumbrances. Subsection 3 provides that the defendant in the execution may redeem the property so sold by paying the original incumbrance with legal interest, and by paying the purchaser his purchase money with interest. HELD that, where land sold at an execution sale was incumbered, the purchaser had no right to possession under section 1689, but that the execution defendant might redeem at any time during the continuance of the original incumbrance; the execution purchaser acquiring only a lien subordinate to such incumbrance.

TURNER & HAZELRIGG, FOR APPELLANTS.

POINTS AND AUTHORITIES.

1. The purchaser at execution sale of encumbered real estate, who only acquired a lien thereon under section 1709, Kentucky

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Statutes, is not entitled to possession thereof after the notice required by section 1689, Kentucky Statutes; but inasmuch as he only has a lien, and a subsidiary lien at that, his remedy is by suit in equity, to which all those interested must be parties, so that the rights and equities of all parties may be considered and equitably adjusted. Kentucky Statutes; sec. 1709, subsec. 5; Johnson v. Johnson, 22 Ky. Law Rep., 43; 1 vol Rev. Stats. p. 488, art. 15, sec 1; Atkins v. Eminson, &c., 10 Bush, 12.

2. The sheriff who makes such an execution sale of encumbered real estate has no authority to convey same to the purchaser thereunder, who only becomes a lien holder; and especially has he no power to deprive the execution defendant of the right to redeem which is expressly given by subsection 3 of section 1709, Kentucky Statutes.

C. E. COONS & C. W. GOODPASTURE, FOR APPELLEE.

The only points the court will be called upon to determine are:

1. Can a person mortgage his land for an indefinite period, and compel all his creditors to wait the termination of the mortgage lien before possession of the debtor's property can be had upon a sale under execution?

2. Should appellant be correct in his contention of the law his pleading is defective. He does not plead any consideration for the mortgage, any obligation or indebtedness existing from Wilson to McCue, and secured by mortgage that the court may judge from the facts set out, and not from his conclusions that the mortgage is valid and *bona fide*.

3. The demurrer to the petition and answer of Sarah Wilson was properly sustained. She says it was her land and was paid for by her money, but sets out no equitable reason why the title was not taken to her, nor any fraud or mistake or ignorance of the act of her husband, or any reason why she should be preferred to her husband's creditors. If she permits her husband to invest her money in land, taking title to himself, and permits creditors to extend credit to him on the faith of this evidence of his being solvent, she is estopped to claim the land after execution is levied thereon and same sold for her husband's debts.

OPINION OF THE COURT BY JUDGE SETTLE—REVERSING.

Appellees, W. B. Flanders and others, judgment creditors of the appellant Johnson Wilson, caused executions to be levied on 11 acres of land in Bath county of which he was

the owner. On April 10, 1899, it was sold by the sheriff, and appellees became the purchasers. After procuring of the sheriff a deed of conveyance to the land, appellee gave appellants written notice, as provided in section 1689, Kentucky Statutes, that they would on February 23, 1900, enter motion in the Bath circuit court for judgment for the possession thereof, which motion appears to have been duly made on the day named in the notice. The executions and sheriff's deed do not appear in the record, but, as the motion for possession was made before the end of the year succeeding the execution sale, it may be inferred that the land brought two-thirds of its appraised value. By the petition of Johnson Wilson's wife, which was taken as her answer, and filed on the day the motion was entered, she was made a party to the proceedings, and claimed to own the land; but a demurrer was filed to the answer at the following term, and properly sustained, as the facts herein alleged failed to show title in her. During the latter term, and before the demurrer to Mrs. Wilson's answer was sustained, appellant Johnson Wilson offered to file an answer, and later an amended answer, to appellees' motion, in which he set up title in himself to the land, and the existence of a mortgage thereon to one James McCue, to secure a \$3,500 note held by him. The court refused to permit either the answer or amendment to be filed, but forthwith rendered judgment giving appellees possession of the land, and requiring appellants to pay the costs. From that judgment, appellants prosecute this appeal.

While much is alleged in the answer and amendment by way of conclusion, they do not present the material facts. First, that a *bona fide* incumbrance in the mortgage to McCue of \$3,500 exists on the land, which is of a date antecedent to the levy and sale under appellees' executions;

and, second, that the mortgage debt is unpaid. It is true that the answer was not tendered until the term succeeding the motion for the writ of possession was made, but an affidavit filed by his attorney shows that Wilson's age and feebleness (he was then 81 or 82 years of age) prevented an earlier offer to file it. So we are of the opinion that the lower court erred in refusing to permit the answer and amendment to be filed.

The mortgage to James McCue was executed December 30, 1893, by appellants Johnson Wilson and Thomas Johnson, and embraced, in addition to the 11 acres in controversy, several parcels of land in Bath and Montgomery counties owned by them jointly, the consideration being a note of \$3,500 given for money loaned the mortgagors by the mortgagee, which note, by the terms of the mortgage, can not be "collected by law for twenty years." The genuineness of this mortgage appears to have been established by judgment of the Montgomery circuit court, where it was attacked upon the ground of fraud in an action instituted by appellees and others, judgment creditors of appellant, and the judgment of the circuit court was thereafter affirmed by this court. See *Johnson v. Johnson*, 22 R., 43, 56 S. W., 644.

As already stated, appellees' notice and motion for the writ of possession were based upon section 1689 of the Kentucky Statutes, which provides that "the purchaser of lands sold under execution and not redeemed as provided for in this article [that is, within a year from the date of sale], shall have the right after obtaining a conveyance therefor [sheriff's deed] upon ten days' notice in writing to the defendant in the execution whose lands have been so sold, to enter a motion on the docket of the circuit court of the county where the lands are situated for a judgment for

the possession of such lands." It will be observed that the lands referred to in this section are such as are unincumbered by prior liens when sold under execution, for if incumbered, the purchaser at the execution sale will not be entitled to the possession, but acquires by his purchase a lien as provided by subsection 1 of section 1709, wherein it is expressly declared that "the purchaser at the sale shall acquire a lien on such property for the purchase money, and interest, at the rate of ten per centum from the day of sale until paid, subject to the prior encumbrances." Subsection 3 provides that "the defendant in the execution may redeem the property so sold by paying the original encumbrance with legal interest thereon, and by paying the purchaser his purchase money with ten per centum per annum interest thereon." The right of redemption here provided for seems to be extended beyond the time fixed by the statute in sales of unincumbered lands under execution, which is one year, and may be exercised by the defendant at any time during the continuance of the original incumbrance and the lien in favor of the purchaser under execution. The present statute (section 1709) was re-enacted from the Revised Statutes (volume 1, p. 488, art. 15, section 1), and is in language substantially the same; and this court, in *Atkins v. Emison*, 10 Bush, 13, in construing that statute, said: "It has been repeatedly held by this court that since the adoption of the Revised Statutes, the purchaser at the sale of real or personal estate upon which there was a *bona fide* incumbrance by mortgage, etc., acquired only a lien on the property for the purchase money paid by him and ten per cent. interest, subject to the prior incumbrance. This is in fact the language of the act itself. The defendants in the execution having failed to redeem the land, the only remedy left the appellant [pur-

chaser] for the collection of his money was in resorting to a court of equity to enforce his lien, and in doing so it was incumbent on him to make all the parties interested defendants to the action. . . . The Legislature never intended by the act in question to deprive the owner of his title, but, on the contrary, not only permitted him to redeem it, but gave to the purchaser only a lien subordinate to the *bona fide* incumbrances preceding it, and in the disposition of the property, or its proceeds, under the judgment of a court of equity enforcing these liens, the remnant of the mortgaged estate belongs to the mortgagor. . . . This lien for purchase money, made so by the statute, is in effect a junior mortgage, with the exception that, when the purchaser acquires this lien by sale under execution, it extinguishes the original debt, and the liability on the part of the original execution debtor no longer exists. The debt or execution having been satisfied, the purchaser must look to the property on which this lien exists by reason of the execution sale for his indemnity, and nowhere else, as he agrees in making the purchase to pay the debt for the lien subject to the prior incumbrance." We are of opinion, therefore, that appellees are not entitled to the possession of the land sold under their executions, but that they have only a lien thereon subordinate to the mortgage lien of McCue; and although the latter's lien can not be enforced until the expiration of the 20 years' time allowed by the mortgage for the payment of the note named therein, as it is further provided in the statute (subsection 5, section 1709) that "courts of equity shall have control of all encumbered property sold under execution, and the power to make all needful orders for the preservation and forthcoming of the property, and its issues and profits, to satisfy the encumbrance, and to secure the rights of others," the chancellor, under

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the power thereby conferred, may, in an equitable action, with all the parties in interest before the court, grant such orders as will preserve the liens, and protect the rights of the parties, or he may, as provided by section 1691 of the statute supra, in this proceeding, and upon the return of the cause to the lower court, require such pleadings to be filed, and parties brought before the court, as may be necessary to a final equitable judgment in respect to the rights of all the parties interested.

Judgment reversed, and cause remanded, with direction to the lower court to permit the answer and amended answer of Johnson Wilson to be filed, and to set aside the order awarding to appellees possession of the land, and for such further proceedings as may not be inconsistent with this opinion.

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CASE 59—ACTION OF OHIO VALLEY BANKING & TRUST COMPANY AS ASSIGNEE OF J. H. McALLISTER, AGAINST J. H. McALLISTER, TO SUBJECT THE REMAINDER INTEREST OF ASSIGNOR IN LAND, TO HIS CREDITORS.—JAN. 15.

McAllister v. Ohio Valley Banking & Trust Co.

APPEAL FROM HENDERSON CIRCUIT COURT.

JUDGMENT FOR PLAINTIFF AND DEFENDANT APPEALS. **AFFIRMED.**

ASSIGNMENT FOR BENEFIT OF CREDITORS—CONTINGENT REMAINDER—INTENT OF PARTIES—SUFFICIENCY OF DEED.

- Held: 1. A contingent remainder in land is a vendible estate, and in a deed of assignment of "all real and personal estate of every description," such estate passed to the assignee whether the parties to the deed believed it so passed or not.
2. Under Kentucky Statutes, section 75, providing that a deed of assignment for benefit of creditors "shall vest in the assignee

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the title to all the estate, real and personal, of the assignor," and section 2341, providing that "any interest in or claim to real estate may be disposed of by deed or will in writing." a deed of assignment, which, after specifically naming certain property, real and personal, contained the words, "also all other real and personal estate of every description owned by the assignor," was sufficient to pass a contingent remainder in land.

R. D. VANCE, FOR APPELLANT.

PROPOSITIONS DISCUSSED.

1. A deed of general assignment for the benefit of creditors conveying "real and personal estate of every description" owned by assignor does not embrace or convey a contingent remainder interest devised to the assignor.

2. Where a contingent remainder in land is devised and the contingency happened, after an assignment has been made by the devisee for the benefit of his creditors, the title vests in the devisee on the happening of the contingency and is after acquired property.

AUTHORITIES.

Am. and Eng. Ency. of Law, 2d ed., p. 99; Am. and Eng. Ency. of Law, 2d ed., p. 111 and notes; Am. and Eng. Ency. of Law, 1st ed., vol 20, p. 969* and notes; Challis' Real Prop., 58; Fearne on Remainders, 552; Matter of Ryder, 42 Am. Dec., 109; *In re Benson*, 16 N. B., 377; 8 Bias, 116; Fed. Cas. 1, 328; *Lepps v. Lee*, 17 S. W., 146; *Loeb v. Struck, et al.*, 42 S. W., 401; *Goatley, etc. v. Crowe, etc.*, 66 S. W., 1030.

YEAMAN & YEAMAN, FOR APPELLEE.

Our contention is:

That it does not matter whether appellant's interest in the land in question be held to be a vested remainder or a contingent remainder, it was vendible, the subject of voluntary or compulsory sale and is such an interest in or claim to real estate as may be disposed of by deed or will in writing under section 2341, Kentucky Statutes, and beyond question passed to the assignee under the deed of assignment "of all other real and personal estate of every description owned by the assignor."

AUTHORITIES CITED.

Kentucky Statutes, sec. 2341; *Overton v. Means*, 2 Ky. Law Rep., 211; *Knefler v. Shrieve*, 78 Ky., 297; *White's Trustee v. White*, 86 Ky., 602; (9 Ky. Law Rep., 757, 7 S. W., 26.)

OPINION OF THE COURT BY JUDGE BARKER—AFFIRMING.

On the 23d day of February, 1897, the appellant, John H. McAllister, being indebted to various persons, and unable to pay his creditors in full, executed and delivered a general deed of assignment to the Henderson Trust Company, conveying all his property, both real and personal, for the benefit of his creditors. The Henderson Trust Company afterwards consolidated with the appellee, the Ohio Valley Banking & Trust Company; and the latter company acquired the rights, and undertook to execute all of the duties of the Henderson Trust Company, necessary to carry into effect said trust. The deed of trust, the terms of which are involved in this action, contained a schedule of property, both real and personal, specifically named by the assignee as passing under the transfer, and in addition to this schedule were these words: "Also all other real and personal estate, of every description, owned by said McAllister." In addition to the property specifically mentioned in said deed of assignment, John H. McAllister was the owner of a contingent remainder in a large tract of land situated in Henderson county, Ky., his future interest in which was based upon the contingency of the life tenant, Dr. C. E. McAllister, of Chicago, dying without heirs of his body. It seems not to have been considered by either the assignee or the assignor, in the deed of assignment, that this contingent remainder passed under the deed of assignment to the assignee. Subsequently to the execution and delivery of the deed of assignment, the life tenant, Dr. C. E. McAllister, died, without heirs of his body, and the contingent remainder interest of appellant became a fee simple estate in said land. The appellee, the trust company, then instituted proceedings in the Henderson circuit court to subject the interest of John H. McAllister in said land;

claiming that the interest of the assignor passed to it under the deed of assignment. Upon trial in the court below, the chancellor held that said interest passed by the deed of assignment, and that the fee-simple interest was vested in appellee for the benefit of the creditors of assignor. From this judgment, appellant is complaining in this court.

The question as to whether or not the contingent remainder passed under the deed of assignment to appellee is one of law, and what the assignee and assignor may have thought about the matter is quite beside the question. The assignee undertook to convey to the assignor, in trust for his creditors, all of the property owned by him, whether real or personal; and if the contingent remainder constituted a vendible interest which passed by deed or will, then it vested in the assignee, in trust for the creditors, whether the parties to the deed of assignment believed it so passed, or not. Section 75 of the Kentucky Statutes, among other things, provides: ". . . And the deed [of assignment] shall vest in the assignee the title to all of the estate, real and personal, with all deeds, books and papers relating thereto belonging to the assignor at the time of making the assignment, except the property exempt by law shall not pass unless embraced in the deed." Section 2241 of the Kentucky Statutes provides: "Any interest in or claim to, real estate may be disposed of by deed or will, in writing." In the case of *Bank v. Baumeister*, 87 Ky., 6 (9 R., 845) (7 S. W., 170), it was held that a contract for an option to purchase real estate at an agreed price, within a specified time, is enforceable, and such option may be sold, assigned, or mortgaged. In the case of *White's Trustee v. White*, 86 Ky., 602 (9 R., 757) (7 S. W., 26), passing upon this very question, this court said: "It is contended

that by the common law a contingent remainder could not be sold by a decree of court, for the reason that the decree could operate on the title only, and, as no title passed to the contingent remainderman until the happening of the contingency, there could be no sale in the interim by a decree of court. But section 6, art. 1, c. 63, of the General Statutes (now section 2341 of the Kentucky Statutes), provides: 'Any interest in, or claim to, real estate may be disposed of by deed or will, in writing.' This provision clearly embraces a contingent remainder interest in land, and, as R. G. White conveyed the same by deed for the equal benefit of his creditors, the chancellor should have ordered the sale of said interest." Counsel for appellant seeks to distinguish this case from the case at bar, because in the deed of assignment in the case cited the assignee undertook to convey his contingent remainder by name, whereas in the case at bar the deed of assignment does not specifically mention the contingent remainder interest of appellant as passing under the deed. We do not think the distinction sound. The deed of assignment, as before said, undertook to convey to appellee all of the property, whether real or personal, owned by appellant at the date of the assignment; and the statute provides that such a deed shall operate to pass all property of the assignee, whether real or personal, except exempt property, which is not mentioned in the deed of assignment.

The only question in this case is whether or not a contingent remainder is a vendible estate, which passed by deed or will in writing. In the case of *Overton v. Means*, 2 Ky. Law Rep., 211, this court said: "Whether an interest by devise in land is vested or contingent, it is vendible, and subject to sale for the satisfaction of debts."

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It seems to us that the question whether or not appellant's contingent remainder interest in the land in question passed under the deed of assignment made by him to appellee is concluded against him by the authorities herein cited, wherefore the judgment is affirmed.

CASE 60—ACTION BY MILTON JOHNSON AGAINST C. F. ZWEIFART FOR LEGAL SERVICES, &c.—JAN. 16.

Johnson v. Zweigart.

APPEAL FROM MASON CIRCUIT COURT.

JUDGMENT FOR DEFENDANT AND PLAINTIFF APPEALS. REVERSED.

PAROL EVIDENCE—ADMISSIBILITY TO VARY WRITING.—PLEDGE OR SALE—CONSTRUCTION OF WRITING—CONTEMPORANEOUS RELEASE OF ATTORNEY'S FEES—USURY.

Held: 1. Where a transaction is evidenced by an unambiguous written instrument, showing it to have been a pledge of notes as collateral security, parol evidence that the notes were in fact sold absolutely is inadmissible; no fraud or mistake having been alleged.

2. An attorney to whom his client was indebted secured \$2,500 from the client, and executed a written receipt in full for his fees. He also turned over to the client certain notes; the client signing an instrument which declared that the attorney "has sold and delivered to me, for the sum of \$2,500 cash, the following notes: . . . I am, however, after I have collected (net) on said notes the sum of \$2,500 and interest, . . . to return to said J. [the attorney] the unpaid notes, or cash if same be then collected." HELD, that the transaction was a pledge of the notes as collateral security for a loan of \$2,500, and not an absolute sale, and that the contemporaneous release of attorney's fees was void, as constituting usury.

E. L. WORTHINGTON, FOR APPELLANT.

AUTHORITIES.

1. When a sale is made to secure the repayment of money advanced the law regards it as a mortgage, whatever may be

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its form and whatever name the parties may choose to give it. *Flagg v. Mann*, 2 Sumner, 486; *Allen v. Brown*, 23 Ky. Law Rep., 217.

2. Parol evidence of a prior contract is not admissible to contradict the terms of a written contract. *Crane v. Williamson*, 23 Ky. Law Rep., 639; 2 Wharton on Evidence, sec. 1014; *Wrought Iron Range Co. v. Graham*, 80 Fed. R., 474; *DeWitt v. Berry*, 134 U. S., 306.

L. W. ROBERTSON, FOR APPELLANT.

1. It will be observed that the agreement signed by Zweigart mentions the sale of certain notes therein named, and does not mention in any way the sale of fees of Johnson against Zweigart, though it is clear that the release signed by Johnson and the mortgage by Zweigart embodied the mutual understanding of the parties and the entire agreement.

The proof shows that there was no consideration to uphold the release. If there was any gratuity in the case, that release was the gratuity; anyhow, it was an additional compensation for the forbearance or loan of \$2,500, and was wholly usurious, and under the circumstances unconscionable and ought not to stand.

2. The rule is that where there is no imperfection or ambiguity in the language of a writing, it will be deemed to express the entire and exact meaning of the parties, and parol evidence can not be heard to change the contract or to show an intention or understanding different from that expressed in the written agreement.

AUTHORITIES.

Jones on Evidence, sec. 437; *DeWitt v. Berry*, 134 U. S., 306; *Castlennen v. Southern Mut. Life Ins. Co.* 14 Bush, 197; *O'Neal v. Rumley Co.*, 21 Ky. Law Rep, 936.

L. W. GALBRAITH, FOR APPELLEE.

SUMMARY OF BRIEF.

1. Statement of case.

2. The rule of inadmissibility of oral testimony to vary written contracts does not apply where the original contract was verbal and entire and only a part of it was reduced to writing, or in case of collateral or contemporaneous verbal contract. *Louisville Banking Co. v. Leonard, Trustee*, 90 Ky., 106; *Henning v. Burnett & Co.*, 13 Ky. Law Rep., 969; *Duncan, etc., v. Sheehan*, 13 Ky. Law Rep., 780.

3. Where there is doubt as to whether the writing offered as

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the contract between the parties is the written memorial of the contract, that question should be submitted to the jury. Jones on the Law of Evidence, secs. 437 and 444; *The Bank of British North America v. Cooper*, 137 U. S., 473; Pollock on Contracts, sec. 458; Wharton on the Law of Evidence, secs. 1015, 1016.

4. The finding of the jury was justified by the evidence

GARRETT S. WALL, FOR APPELLEE.

1. The rule of law that written contracts can not be varied by parol testimony is conceded, but like all good rules, is subject to exceptions. In this case we do not have to rely on the exceptions because the rule is not applicable. We do not ask the court to vary the contract of September 3, 1898, by parol, or at all. Zweigart simply swears that it was not the contract, and denies that he made it and under this denial we claim the right to prove that he had made a complete verbal contract prior thereto, settling all matters of account between the parties and passing all papers and receipts.

2. The rule that parol evidence will not be heard to vary or alter a written contract is not infringed by proof of a collateral parol agreement, which does not interfere with the terms of the written contract, though it may relate to the same subject matter.

3. If Johnson can attack the receipt for fees and say it was usurious, or given without consideration, or that the consideration failed, why can not Zweigart attack and explain the writing of September 3, 1898, and say it was without consideration and no part of the contract as to purchase of fees and notes.

POINTS AND AUTHORITIES.

Hany v. Barney, 15 L. R., 142; *Henning v. Burnett & Co.*, 13 L. R., 969 and 780; *Beverly v. Noel*, 4 L. R., 985; 6 L. R., 442; 85 Ky., 230, 4 J. J. Mar., 120; 7 B. Mon., 589; 3 B. Mon., 51; *Abbott's Trial Brief*, 2d edition, 246-247; 17 Ky. Law Rep., 619, 141 U. S., 510.

OPINION OF THE COURT BY JUDGE O'REAR—REVERSING.

This suit was brought by appellant, a lawyer, against appellee, on an account for legal services, and for money paid thereabout. The services are not denied. The real defense, outside of the value of the services, is presented by a plea that the fees sued for were settled by a contract made

September 3, 1898, between the parties, by which it is claimed appellee bought from appellant his claim for fees and five certain promissory notes for \$2,500 cash. There is no dispute that, at the time and place claimed by appellee, appellant transferred to him the notes and the claim for fees, or, which is the same, appellant agreed to release his claim for fees to get appellee to take the notes for \$2,500. Nor is there dispute that appellee at that time and place advanced to and for appellant the sum of \$2,500 (about), and took possession of the notes, and took appellant's receipt in full for the fees. The disputed question is, was that sale an absolute one, as appellee contends, or was it a loaning by appellee of the \$2,500 to appellant, and a pledging of the notes to secure it, as appellant contends? If it was the latter, then the agreement evidenced by the receipt whereby appellant released or acquitted appellee of the fees was without lawful consideration; that is, it was in its nature usurious, and not obligatory on appellant. The form of the transaction will not control. It is the fact that determines its character. So we must look to the whole transaction to determine what the parties intended to do, and what they did in this connection.

The negotiations were begun, as is customary, by parol propositions and counter propositions, resulting in the agreement above stated. The parties then reduced to writing their agreement, as follows:

"Maysville, Ky., September 3, 1898. Milton Johnson has sold and delivered to me, for the sum of \$2,500 cash, the following notes, viz.: Wm. Wormald, mortgage, \$1,000; J. A. Coughlin, mortgage, \$100; Wesley Vicroy, personal note, \$125; George Myall, personal note, \$1,200, and policy of insurance; John McGraw, chat. Mortg., about \$500. I am, however, after I have collected (net) on said notes the sum

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of \$2,500, and interest from this date, payable every six months, to return to said Johnson the unpaid notes, or cash if same be then collected. C. F. Zweigart."

"September 3, 1898. Received from C. F. Zweigart full settlement of attorney's fees due me in cases of Martin v. Long & others, and Zweigart v. Lloyd & others. In full to date. Milton Johnson."

The question presented by this appeal is whether appellee could, by his testimony, vary or dispute the writing above copied, and signed by him, without an allegation of fraud or mistake in its execution, and whether it was proper for the court to submit to the jury the question of the binding effect of the above-named writing. Appellee was allowed, over objections, to testify as to an oral sale, and the court submitted to the jury to decide as to whether such an oral sale was made. The court is of opinion that this question was improperly submitted to the jury. Where a series of conferences is consummated by a written document executed by the parties for the expression of their conclusions such writing must be regarded not only as expressing their final views, but as absorbing all other parol understandings, prior or contemporaneous. It must be conclusively presumed, in such a state of case, in the absence of an allegation of fraud or mistake in the execution of the paper, that the entire engagement of the parties is embraced in the writing; and, where its terms are not uncertain, oral testimony of previous colloquies between the parties that would tend in any instance to substitute a new or different contract for the one evidenced by the writing must be rejected. 2 Whart. Ev., section 1014; Crane v. Williamson (111 Ky., 271) (23 R., 689) (63 S. W., 610, 975); De Witt v. Berry, 134 U. S., 306, 10 Sup. Ct., 536, 33 L. Ed., 896. This rule, founded upon long experience, recognizes that the parties

to the agreement has seen fit to culminate all their negotiations in a memorial not subject to the uncertainties of forgetfulness or other similar infirmity, and have thereby agreed to adopt such memorial as the sole evidence of their contract. Expedience and experience alike sustain the wisdom of the rule.

Applying the doctrine to the case at bar, the court should have excluded, under the state of the pleadings in this case, all that transpired between the parties that tended to substitute a different contract or understanding for the one evidenced by the writing. It should, on the contrary, have told the jury that the effect of this writing (the one first copied above) was a mortgage or pledge of the notes therein mentioned to secure to appellee the payment of \$2,500, and legal interest from September 3, 1898, and that the agreement to relinquish the fees, executed simultaneously and as a part of the other agreement, was without lawful consideration and was void. The sole question then left to the jury was—First, whether there was a special contract, as claimed by appellee, by which appellant agreed to collect the notes mentioned in his account at the rate claimed by appellee, and, second, if not, then the jury should have found such sum as, under the evidence, was a reasonable compensation to appellant for the services rendered.

The judgment is reversed, and cause remanded, with directions to award appellant a new trial under proceedings not inconsistent herewith.

Petition for rehearing by appellee overruled.

City of Louisville v. Michels.

CASE 61—ACTION BY JOHN MICHELS V. CITY OF LOUISVILLE FOR PERSONAL INJURY CAUSED BY PROJECTING LIMB OF SHADE TREE OVERHANGING STREET.—JAN. 21.

City of Louisville v. Michels.

APPEAL FROM JEFFERSON CIRCUIT COURT, COMMON PLEAS DIVISION.

JUDGMENT FOR PLAINTIFF AND DEFENDANT APPEALS. AFFIRMED.

MUNICIPAL CORPORATIONS—STREET—LOW LIMBS OF TREES—EMPLOYEE OF CITY—CONTRIBUTORY NEGLIGENCE—PLEADING—LIABILITY OF CITY.

- Held: 1. The fact that the appellee was the servant of the city, driving a patrol wagon, did not impose on him the duty to negative contributory negligence by averring in his petition that he did not know the condition of the street, where he was injured, as it was no part of his duty to examine the streets and report upon their condition.
2. A city is liable under its duty to keep its streets in good condition, for injury to one, who, without contributory negligence, is driving a wagon along a street, and is thrown therefrom by coming in contact with a large limb of a tree projecting over the street dangerously low.

HENRY L. STONE, CITY ATTORNEY, FOR APPELLANT.

Our contention is:

1. Appellee's petition is defective and did not authorize a verdict and judgment against appellant. There is no allegation therein that the appellee did *not* know of the condition of the tree in the public way where he got hurt, or have equal opportunities of knowing the same as appellant.

2. The court erred in not giving to the jury a peremptory instruction to find for the appellant. Even if appellee's petition had not been fatally defective in the respect mentioned, still the evidence on the trial introduced by appellee, showed conclusively that he was guilty of contributory negligence, and not entitled to recover any damages.

3. The court erred in refusing to give the instructions offered by appellant and in giving instructions numbers one and two of its own motion.

The court, by its instructions in substance, told the jury that it was their duty to find for appellee, if the city knew that

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the limb was dangerous to persons using the street or could have known it by ordinary care, unless appellee, by negligence on his part contributed to cause or bring about the injury of which he complained and that he would not have been hurt but for his own negligence, if there was any. These instructions were highly prejudicial to the rights of appellant.

AUTHORITIES CITED.

1. Mellott v. Louisville & Nashville Railroad Co., 19 R., 379; Bogenschutz v. Smith, 84 Ky., 330; Williams v. Louisville & Nashville Railroad Co., 64 S. W., 728; 2 Thompson Negligence, p. 108.

2. Bailey on Master's Liability for Injuries to Servants, 165; Compton v. Inhabitants of the Town of Revere, 60 N. E., 931; City of Columbus v. Griggs, 10 Am. Neg. Rep., 28; Samples v. City of Atlanta, 95 Ga., 110; 22 S. E., 135; Yager's Admr. v. Receivers of A. M. & O. R. R. Co., 88 Fed. Rep., 773; Tuttle v. Detroit. Grand Haven & Milwaukee Railroad Co., 120 U. S., 189; Dertott Crude Oil Company v. Gable, 94 Fed. Rep., 73; Southern Pac. Co. v. Seley, 152 U. S., 152; R. R. Co. v. McDade, 135 U. S., 570; Bush v. Grant, 61 S. W., 363; Mellott v. Louisville & Nashville Railroad Co., 19 R., 379; Thompson on Negligence, vol. 2, p. 1008.

AUGUSTUS J. BIZOT AND O'NEAL & O'NEAL, FOR APPELLEE.

1. We contend that, so far as this injury is concerned, the relation of master and servant did not exist, because, although appellee was a servant in one sense, as a driver of patrol wagon, he was not a patrolman, and it was not part of his duty to inspect the streets or to observe obstructions therein.

2. The evidence shows that while the appellee had previously driven under this limb in a low uncovered wagon, he did not know or suspect it to be dangerous to a covered wagon which he was driving when he was injured, but that the city had previously been notified that it was dangerous to a covered wagon like the one then being used by appellee.

3. But even if appellee was guilty of contributory negligence, which we deny, it was proper for the case to be submitted to the jury under a proper instruction of the court which was done.

AUTHORITIES CITED.

Bogenschutz v. Smith, 84 Ky., 330; Williams v. L. & N. R. Co., 23 Rep., 1124; Mellott v. L. & N. R. Co., 19 Rep., 379; L. & N. R. Co. v. Rains, 15 R., 423; Gerke Brewing Co. v. Busse, 11 Rep., 322; L. & N. R. Co. v. Breeding, 13 Rep., 397; N. N. & M. V. Co. v. Dentzell, 19 Ky., 42.

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OPINION OF THE COURT BY JUDGE PAYNTER—AFFIRMING.

The appellee for some years had been a driver of a patrol wagon in the city of Louisville. Previous to August 23, 1899, he had driven an uncovered wagon. On that date he was driving a patrol wagon to which were attached two horses. It had been used at the Central Police Station, but had recently been sent to the station where appellee was located. While driving on Main street the top of the wagon collided with the limb of a shade tree about six or eight inches in diameter, which projected over the street so low as to come in contact with the top of the wagon, which caused the horses to break the kingbolt, thus detaching the fore wheels from the bed of the wagon, and precipitating him from his seat to the street, resulting in such serious injuries to his leg that after ten months of great suffering it became necessary to amputate it to save his life, and, as a result of the fall, his left arm was seriously injured. He sought to and did recover judgment against the city upon the grounds that the shade tree, being within the corporate limits of the city of Louisville, was permitted to grow and branch over the street in such a manner as rendered it dangerous to persons driving along the street, and that the city knew of its condition, and failed, after reasonable delay, to remove it. The evidence tended to show that Michels' duties required him to drive at a considerable rate of speed to and from different parts of the city in obedience to demands of the police department for the purpose of conveying prisoners to and from the police stations, and that while driving along the street, and passing a wagon loaded with tobacco stems, drawn by four mules, the top of the patrol wagon, as above stated, was struck by the projecting limb. The case was prepared and tried upon the idea that the appellee was entitled to recover as would

have been any citizen driving over the street and who had received an injury under the circumstances detailed.

It is urged upon the part of the city that, as Michels was a servant in its employ, he had an equal opportunity of knowing the condition of the street as did the master, and that he should have negatived contributory negligence in his petition by averring that he did not know the condition of the street, and did not have an equal opportunity with the master of knowing its condition. It was no part of the duty of a driver of a patrol wagon to examine the streets, or report their condition. In the discharge of his duties it necessarily required him to drive hastily over the streets to such points as the demands of the police department required. It can not be said that, because his business required him to drive over the streets, his opportunities were as good as the master's for knowing their condition. It is the duty of the city to have the streets constructed, and keep them in repair; and it is the business of the policemen of the city to discover and report any defects in them, or dangerous obstructions over them. If there had been a defect in the harness used upon the horses, or a defect in the wagon which he drove, of which he was aware, or could have been aware by the exercise of ordinary care, and from a failure to exercise it the injury resulted to him, then the principle invoked in behalf of the city, which is part of the law of master and servant, would apply. It was no more the duty of the driver of a patrol wagon to inspect the streets over which he drove than it was the duty of a brakeman to inspect the track of a railway, or know that it has been safely constructed. It is the duty of a municipal corporation to maintain its streets in good condition and repair, so as to keep them reasonably safe for the traveling public. This imposes the duty of

keeping them clear of obstructions which are dangerous to persons using them, and for failure to do so it is liable in damages to one who may be injured in consequence of such obstructions. This limb was six or eight inches in diameter, and necessarily it had been an obstruction for some years. Besides, the testimony in this case showed the city's attention had been called to the danger of permitting it to remain in its condition; in fact it appeared that persons had been previously hurt, or had come in contact with it while using the street, and the city's attention had been called to these facts.

The court below gave the following instructions: "It is the duty of the defendant, the city of Louisville, to exercise ordinary care to keep its highways in a reasonably safe condition for public use, and if you shall believe from the evidence that at the time mentioned in the petition—that is, August 23, 1899—at the point on Main street between Seventeenth and Eighteenth streets, where this accident is said to have occurred, there was a limb protruding from a tree across into the street or highway in such manner or in such a way as to make it dangerous to persons using that highway with vehicles, and that the city knew of the presence of the limb there, or could have known of it by the exercise of ordinary care, and that the plaintiff was injured by reason of the vehicle in which he was riding coming in contact with the limb in question, then the law is for the plaintiff, and you should so find, unless you should further believe from the evidence that the plaintiff, by negligence upon his part, contributed to cause or bring about the injury of which he complains, and that he would not have been injured but for his contributory negligence, if any there was. (2) But unless you shall believe from the evidence that the limb of the tree in question was a dangerous

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obstruction to the use of the street by persons in vehicles, or that the city did not know of the obstruction, and could not have discovered it by the exercise of ordinary care, then the law is for the defendant, and you should so find, unless you shall believe that the limb had existed in its dangerous condition for such a length of time that the city or its officers knew, or could have ascertained, the dangerous condition of the limb with reference to people using the highway, by the exercise of ordinary care." We think these instructions embody the law of the case.

The verdict is not excessive, because of the great suffering of the appellee and the permanent injury which he received. The injury practically deprives him of any means of making a living for himself and family.

Judgment is affirmed.

CASE 62—ACTION BY CITY OF LOUISVILLE AGAINST R. W. WOOLEY AND OTHERS TO RECOVER TAXES.—JAN. 21.

Woolley, &c. v. City of Louisville.

APPEAL FROM JEFFERSON CIRCUIT COURT, CHANCERY DIVISION.

JUDGMENT FOR PLAINTIFF AND DEFENDANTS APPEALS. AFFIRMED.

TAXATION—SUIT FOR TAXES—PLEADING—SUBMISSION OF ACTION—CLERICAL MISPRISION—TAX BILLS—DUPLICATES—EVIDENCE—PRIMA FACIE EVIDENCE—CONSTITUTIONAL LAW—STATUTES—RES JUDICATA—LIMITATION—WRONGFUL ASSESSMENT—SPECIAL LEGISLATION—BOARD OF EQUALIZATION—COMMISSIONERS OF SINKING FUND—LIFE TENANT—REMAINDERMEN—MANNER OF SALE.

Held: 1. Where the issues have not been completed, though they should have been, the party in default as to time, is not entitled to a continuance, it not being shown that any advantage was taken of the defendants and it appearing that every allegation against them was controverted, and in such case it was

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- not error in submitting the case without waiting for the issues to be formally completed where it appears that the actions had been pending for a long time and the parties had had full time to prepare their case, and no one was prejudiced thereby.
2. To render a judgment before the action stood for trial is under Civil Code, sec. 517, a clerical misprision, but no motion having been made in the lower court to set the judgment aside, under Civil Code, sections 516, 518, the objection is not available in the court of appeals.
 3. Kentucky Statutes, section 2996, providing that "each tax bill shall be authenticated by the assessor by his signature or a stamped *fac simile* thereof, and when so authenticated, it shall be *prima facie* proof that all steps have been taken to make it a binding tax bill for the amount and purposes, and against the person and property therein named, and this rule shall apply to the tax bills of 1885 and 1886 that have been so authenticated under the ordinance of the general council," is a valid statute, and the fact that the ordinances for the years 1885 and 1886 are not filed and there is no proof that the provisions of the ordinances were complied with is immaterial, because the court must take judicial knowledge of the ordinances of the city, as provided in Kentucky Statutes, section 2775.
 4. When the genuineness of a tax bill is denied, the city, to make out its *prima facie* case, must show that the tax bills were made out and signed by the assessor as required by Kentucky Statutes, section 2996, *supra*, and when this is shown the *prima facie* case is made out as fully as if there had been no denial, and the burden then shifts to the defendant to show that the proper steps were not taken.
 5. In this case, some of the original tax bills having been lost, by a consent order duplicate tax bills were substituted therefor, and such duplicates having been used in taking the depositions and treated by the court as part of the record, the fact that they were not marked "filed" by the clerk is not chargeable to appellee, and this court will treat them as part of the record. Where the original tax bill is lost we see no reason why the same effect should not be given to a duplicate of it made out and certified by the officer and proved by him to be a correct duplicate.
 6. An order of injunction, made in a previous action between the parties hereto, which recites that "it is agreed and so ordered that the defendant, the city of Louisville, is hereby perpetually enjoined from asserting any claim for taxes in or to the property described in the petition prior to March 31, 1884," applies

- only to the taxes levied prior to March 31, 1884, although it was entered on June 19, 1889.
7. Kentucky Statutes, section 2998, which is the act of May 12, 1884, is not unconstitutional in allowing interest on unpaid taxes, the giving of interest thereon is no more than a penalty for their non-payment, the validity of which has long been recognized by this court.
 8. Kentucky Statutes, section 2986, providing that "no mistake in or omission of the right name of the owner or holder of the land or improvements liable to be assessed under the provisions of this act, shall impair any assessment thereof, if such land be designated in the books (required to be kept by the assessor by Kentucky Statutes, section 2985) by its corresponding number and block on the map, or if such improvement be there designated by the number and block of the land on which its rests, or if such lands and improvements be otherwise fully identified in said books," is not special or local legislation because it applies only to cities of the first class and the city of Louisville being the only city of the first class in the State, and there is no reason why the Legislature may not provide that irregularities in the assessment shall not avail the taxpayer to escape the payment of his public dues when there is enough in the assessment to show the property taxed.
 9. Under act of March 9, 1867, and Kentucky Statutes, sections 3010, 3011 and 3024, creating and prescribing the duties of the board of commissioners of the sinking fund of the city of Louisville, and section 2979, providing that "all taxes already levied or imposed under existing laws, and not yet paid remain payable unless the contrary be hereafter provided," the taxes levied for the benefit of the sinking fund are in substance levied for the payment of the debts of the city, and the fact that they were made payable to the said commissioners, does not affect in any manner appellant's liability.
 10. The fact that the board of equalization was not properly elected as required by Kentucky Statutes, section 2994, is unavailing to the appellants, as they do not show that they made any complaint of any assessment.
 11. Where land was conveyed to Mrs. W. for life with remainder to her heirs, in a suit against her for taxes on such land, her children were not necessary parties, inasmuch as it could not be known who were her heirs until she died, and no cause of action accrued against them until her death.
 12. Kentucky Statutes, section 2998, provides that "all tax bills, uncollected in whole or in part . . . shall be deemed a debt from such person (owing same) to the city arising as by contract, and

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may be enforced as such by all remedies given for the recovery of debt in any court competent for that purpose;" section 3005 provides that "the action herein authorized and the judgment and subsequent proceedings therein . . . shall be conducted in all respects like suits upon liens arising from contract, and the court shall have jurisdiction of all suits for taxes irrespective of amount," and section 3006 provides that "from the beginning of the action a lien for each tax bill assessed against the same owner or set of owners shall also arise upon every piece of land or improvement still owned by him or them, with a view to the sale of less than all the pieces for all the tax bills subject to the marshalling of burdens as against third parties;" under these provisions the chancellor, having a broad discretion in enforcing tax liens, did not err in directing a sale of so many of the lots as might be necessary to make the judgment; which was really less oppressive on the defendants than to order parts of the lots to be sold.

13. Kentucky Statutes, section 3007, relating to the collection of taxes due by infants or persons of unsound mind, providing that land owned by them, shall not be sold . . . "so as to defeat the reversions, remainders, or future estates, while any future estates are outstanding, unless the reversioners or remaindermen are ascertained and are of full age," has no application to sales where the remaindermen are ascertained and are of full age.
14. In an action by a city for taxes on property in which there were interests in remainder, the court in its decree properly "reserved power over the distribution of the fund arising from the sale ordered to the parties respectively entitled thereto," inasmuch as the city had a lien on the remainder as well as on the particular estate, and if it shall turn out when the sale is made, that any injustice is done the remaindermen, the court can adjust this matter between them and the life tenant.

R. W. WOOLLEY AND H. M. LANE, FOR APPELLANTS.

H. L. STONE AND JOHN C. RUSSELL, FOR APPELLEES.

There being no brief in the record by appellee, and those filed by appellant being so voluminous, containing hundreds of pages, and not classified and authorities cited under the appropriate heading as required by rule 16 of the court of appeals, the reporter has deemed it best not to undertake to classify appellant's briefs, especially as the points relied on are set out in the opinion of the court following.

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OPINION OF THE COURT BY JUDGE HOBSON—AFFIRMING.

Mary J. Woolley, owned a number of lots in the city of Louisville, and these actions were instituted to enforce the lien of the city for taxes on the property for the years 1885-1900, inclusive. She died on February 2, 1897, leaving surviving her, her husband and two daughters, who are the appellants herein. The first suit (No. 3,140) was filed May 26, 1888, on the taxes for the years 1885-88, inclusive. On June 18, 1888, the defendants filed a demurrer to the petition, and no further steps appear to have been taken until August 19, 1891, when they filed their answer. Nothing further was done in the case until June 30, 1900, when the plaintiff filed an amended petition, setting up the death of Mrs. Woolley. The property was assessed in the name of Mary J. Woolley. She was sued in this name, and also answered in the name of Mary E. Woolley. As we understand the record, her maiden name was Mary E. Johnston, and in this way her name was sometimes written "Mary E. Woolley," and sometimes "Mary J. Woolley." As more than three years had elapsed after her death, there was no revivor of the case against the children, but the court held that it might proceed against her surviving husband, who was a party to the action originally, and that his interest in the land might be subjected to the taxes without revivor. A reply was filed to the answer, and after various amendments to the pleadings the issues were made up. The second action, known as "No. 4,992," was filed August 8, 1894, to recover for the taxes for the years 1889-94, inclusive. The defendants filed a demurrer to the petition on September 12, 1894. The demurrer was passed from time to time. The plaintiff amended its petition, and on April 14, 1896, the defendants filed answer. After this in some way the papers of the case were lost, and nothing was done until

March 12, 1898, when the plaintiff tendered an amended petition, setting up the death of Mrs. Woolley, and praying a revivor. The court held the application to be too late, and refused to revive the action, but on appeal to this court, the judgment dismissing the action was reversed. 22 R., 405, 57 S. W., 499. Among other things, a consent order was entered, filing a substitute for the original petition, also duplicates of the tax bills sued on, "to have the same force and effect as the original petition and original tax bills," and the action was dismissed without prejudice as to the taxes for the years 1893 and 1894. On the return of the case from this court an answer was filed to the amended and substituted petition, to which on November 24, 1900, the plaintiff filed a reply. The third action, known as "No. 5,040," was filed on August 16, 1894, to recover the taxes for the same years as in No. 4,992, but on other property, which was assessed in the name of R. W. Woolley, trustee for Mary E. Woolley. The defendants filed a demurrer to the petition, as in the other cases. The plaintiff filed an amended petition, and on April 14, 1896, the defendants filed answer. Nothing further was done, as in the second case, until after the death of Mrs. Woolley, when a similar amended petition was tendered, and, the then record being lost, a similar substitute petition was filed, and duplicates of the tax bills sued on, by a like consent order. The action was dismissed without prejudice as to the taxes for the years 1893 and 1894. There was the same ruling as to revivor, appeal to this court, and reversal, as in the second case. A reply was filed to the answer, and various other pleadings were filed, making up the issue. On July 14, 1898, the city filed five actions, numbered 18,257, 18,258, 18,259, 18,261, and 18,262, for certain taxes for the year 1897, and

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garnished appellant's tenant, besides seeking to enforce a lien on the land. In each of these cases the answers were filed, and some other steps taken. On August 16, 1898, the city filed two other suits (Nos. 18,534 and 18,535) to recover for the taxes for the years 1893-98. Certain lienholders on the property were also made defendants to the petition. The defendants filed answer on June 24, 1899. On November 17, 1900, the cases were consolidated, and on January 3, 1901, the defendants filed an amended answer of twenty-four paragraphs in the clerk's office. On March 2, 1901, the plaintiff filed an amended petition in the consolidated cases, setting up, among other things, taxes for the years 1899-1900. On March 23, 1900, the defendants filed answer to this amended petition. The court struck from the file the amended answer filed in the clerk's office on February 16th, and refused leave to the defendants to file it of record. On April 16th the plaintiff filed a reply to the answer to the amended petition, and on the 29th the defendants filed a rejoinder. On May 25th the defendants filed an amended answer, and on June 20th the court ordered that the amended answer filed on May 25th be controverted of record, and should not delay the trial of the case. The court also struck from the files the defendants' rejoinder of April 29th, and the actions were submitted. To all of which the defendants objected and excepted. The court gave judgment in favor of the city, and the defendants have appealed. A great number of grounds for reversal are relied on:

1. The actions were submitted before they regularly stood for trial.

As between the city and the defendants, the issues were fully made up before its amended petition was filed, on March 2d. The answer to this amended petition, with

plaintiff's reply thereto, it seems to us, made up the issues completely. Certainly there was no new matter brought out in this pleading which was not covered by the pleadings filed in the consolidated actions, and the court did not abuse a sound discretion in striking from the files the pleadings referred to, which, so far as material, merely reiterated what had been gone over. We are unable to perceive that there was any issue of fact made with either of the lienholders, the Louisville Trust Company, or the Fidelity Trust & Safety Vault Company. The actions had been pending for a long time. The parties had had very full opportunity to prepare their cases, and the court did not abuse a sound discretion in submitting them. Where the issues have not been properly completed for the requisite time, though they should have been, the party in default as to time is not entitled to a continuance. Civ. Code, section 364. We fail to see that the defendants were in any wise prejudiced by the submission. It is not shown that they were taken at any disadvantage or deprived of any proof. Every allegation against them was controverted. "The court must, in every stage of an action, disregard any error or defect in the proceedings which does not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect." Civ. Code, section 134. To render judgment before the action stood for trial under the Code is a clerical misprision. The court has power after the expiration of the term to vacate or modify a judgment for a clerical misprision. Civ. Code, sections 516-518. And no judgment which can be set aside or modified by the court that rendered it, upon motion made after the term in which it was rendered, can be reversed by this court until a motion to set it aside has been made in the inferior court and over-

ruled. Civ. Code, section 763. There has been no motion to set aside the judgment in the lower court, and this objection, if meritorious, is not now available.

2. The allegations of the various petitions were all denied, and, there being no proof to sustain them, the judgment is erroneous.

In section 2996, Kentucky Statutes, it is enacted concerning tax bills: "Each bill shall be authenticated by the assessor by his signature, or a stamped fac simile thereof, and when so authenticated, it shall be *prima facie* proof that all steps have been taken to make it a binding tax bill for the amounts and purposes and against the person and property therein named or described; and this rule of evidence shall apply to the tax bills of 1885 and 1886 that have been so authenticated under the ordinance of the general council." The validity of this statute was upheld in *City of Louisville v. Johnson*, 95 Ky., 254, 15 R., 615 (24 S. W., 875), and has been recognized in many subsequent cases. In certifying the original transcript the clerk stated that certain of the tax bills referred to in the petition, and the duplicate tax bills named in the consent orders above referred to, were not filed. But under a *certiorari* from this court he has sent up copies of these papers, with the following certificate: "I, John H. Page, clerk of the Jefferson circuit court, county and State aforementioned, do hereby certify that the papers attached hereto are true and correct copies of what purport to be, and evidently are, copies of the tax bills, or duplicates thereof, for the years 1889, 1890, 1891 and 1892, filed with the substituted petition in case No. 4,992, City of Louisville, Plaintiff, v. R. W. Woolley *et al.*, Defendants, said to be marked 'Exhibits No. 1 to 56,' inclusive. Said exhibits are and have been among the papers of this action, though they are not

marked as stated, nor are they marked 'Filed.'” Not only were the substituted tax bills filed by a consent order, but they were used in taking depositions, and were evidently treated by the circuit court as part of the record. The only thing lacking is that the clerk failed to mark the papers “Filed,” as he should have done. This omission of his duty is not chargeable to appellee, nor are its rights affected thereby. We must therefore treat the papers as part of the transcript. *Day & Congleton Lumber Co. v. Mack, Stradler & Co.*, 24 R., 640 (69 S. W., 712). The case of *Railroad Co. v. Mayfield*, 18 R., 224 (35 S. W., 924), was entirely different. There no order of court was made filing the pleading. While there was no order of the court filing the original tax bills, it is stated in the pleadings that they are filed therewith, and this allegation is uncontroverted, and no objection was made in the trial court on the ground that the exhibits were not filed. We must therefore assume that the statements of the pleading are true. The exhibits are certified by the assessor as provided in the statute, and, although the fact is denied by the answer, the authenticity of the certificate is established by the proof. The fact that the ordinances for the years 1885 and 1886, or copies of them, are not filed, and that there is no proof that the provisions of these ordinances were complied with by the assessor, is immaterial, because the court must take judicial knowledge of the ordinances of the city, and we find them in the biennial publication required by the statute. Kentucky Statutes, sections 2761, 2775. When the genuineness of the tax bill is denied, the city, to make out its *prima facie* case, must show that the tax bills were made out and signed by the assessor. *City of Louisville v. Kimbel*, 23 R., 1824 (66 S. W., 608). But when this is shown the *prima facie* case is made out as fully as if there had

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been no denial of the regularity of the tax bills, and it is unnecessary for the city to show that all the steps required by the statute in the levying of the tax were taken. The burden then shifts to the defendant to show that the proper steps were not taken. The duplicate tax bills were by the terms of the consent order given the same effect as the original bills. But aside from this, where the original bill has been lost the assessor may make out another bill from his record, and certify it as provided in the statute, and it will make out a *prima facie* case for the city as fully as the one first made out. There is nothing in the language of the statute limiting its operation to the bill first made out by the assessor, and certified by him. The legislative purpose was to make the bills duly authenticated by the assessor over his signature, or a stamped fac simile thereof, *prima facie* evidence. It is the official certificate of the officer that gives the bill this character, and when the original is lost we see no reason why the same effect should not be given to a duplicate of it made out and certified by the officers and approved by him to be a correct duplicate. We therefore conclude that the city made a *prima facie* case by the tax bills referred to; no proof being taken by the defendants showing irregularities in the proceeding, or to sustain the affirmative defenses made in regard thereto.

3. The taxes for 1885 and 1886 were barred by a judgment in a previous action between the parties.

That judgment is in these words, as admitted by the pleadings: "It is agreed, and so ordered, that the defendant, the city of Louisville, be, and is hereby, perpetually enjoined from asserting any claim for taxes in, on, or to the property described in the petition prior to March 31, 1884—being the day on which the petition was filed herein—and the plaintiffs shall recover their costs herein." This

judgment, by its terms, applies only to the taxes levied prior to March 31, 1884, and not to those for the years 1885 and 1886, or any subsequent year, although it was entered on June 19, 1889.

4. Suit No. 3,140 not having been prosecuted with diligence for more than five years, limitation bars the taxes therein sued for.

This precise question was considered and determined otherwise in *City of Louisville v. Meglemry*, 107 Ky., 122 (21 R., 751), (52 S. W., 1052).

5. That action not having been revived against the heirs of Mary J. Woolley in proper time, there can be no judgment subjecting the life estate of her husband, Robert W. Woolley, to the payment of the taxes sued for, although he was a party to the action from the beginning.

In *City of Louisville v. Woolley*, 108 Ky., 691 (22 R., 405), (57 S. W., 499), it was held that no revivor was necessary against him, and that his life estate could be subjected to the payment of the taxes. In that case it was further held that actions Nos. 4,992 and 5,040 might properly be revived against the children of Mrs. Woolley. We regard both these questions as settled by the decision in that case, and not open now to discussion.

6. Section 2998, Kentucky Statutes, in so far as it allows interest on taxes unpaid at 6 per centum per annum, is unconstitutional and void.

This provision is taken from the act of May 12, 1884 (2 Sess. Acts 1883-84, p. 1274), and its validity has often been recognized by this court. *Fonda v. City of Louisville*, 20 R., 1652 (49 S. W., 785); *Crecilius v. City of Louisville*, 20 R., 1551 (49 S. W., 547); *Powell v. City of Louisville*, 21 R., 554 (52 S. W., 798); *Louisville Bridge Co. v. City of Louisville*, 23 R., 1655 (65 S. W., 814). While taxes do not bear interest

unless it is so provided by statute (Louisville & N. R. Co. v. Commonwealth, 89 Ky., 538; 12 S. W., 1064), the imposition of penalties for the nonpayment of taxes is everywhere sustained, and the giving of interest on unpaid taxes is no more than a penalty for their nonpayment. In *Walston v. City of Louisville*, 23 R., 1852 (66 S. W., 385), this precise question was determined. The court said: "Under the Constitution the same rate of taxation must prevail in all cities of the same class, the same time for payment must be provided, and the same penalties imposed for the nonpayment of taxes. To require the payment of interest on past-due tax bills is somewhat in the nature of a penalty. If not, then it is compensation for indulgence in the payment of taxes. It is as much of a general law to impose a penalty for the nonpayment of taxes, or to require the payment of interest on past-due tax bills, in cities of a class, as it is to provide that taxes shall be levied and collected therein. It is a governmental function to impose taxes, and it is equally so to prescribe the method of their collection, and the penalties for nonpayment." How taxes shall be levied, how their collection shall be enforced, and what penalties may be imposed upon delinquents in the several classes of cities, is a matter of legislative discretion. There is nothing in the Constitution forbidding different regulations, as the necessities of the case may require, in different classes of cities. Laws regulating the subject are not local or special legislation forbidden by the Constitution, although there is now only one city in the first class, for when any other city is placed in this class the legislation would apply to it; and, were the rule otherwise, there could be no adequate legislation for a class of cities if at the time there was only one city in that class.

7. There can be no recovery of a tax based on an assess-

ment made under the provisions of the present act or the old charter, unless such assessment is made to and in the name of and against the person as provided in the act.

The act requires the assessor to keep books in which he shall cause to be entered the names of all persons who are the owners or holders of land, and the number and block of each of his lots, according to the maps in his office. Kentucky Statutes, section 2985. It is further enacted: "No mistake in or omission of the right name of the owner or holder of the land or improvements liable to be assessed, under the provisions of this act, shall impair any assessment thereof, if such land be designated in said books by its corresponding number and block on said map; or if such improvement be there designated by the number and block of the land on which it rests; or if such lands and improvements be otherwise fully identified in said books." Section 2986. It is earnestly insisted that this statute is invalid, as local and special legislation, and much force is given to the fact that in the fore part of the section quoted these words are used: "Any lot of land which is not now designated by a number in the assessor's book." It is urged that by the use of the word "now," as well as from the fact that this provision was brought over from the old charter, the Legislature had in mind only the city of Louisville. But although this may be true, still the fact is that the act applies to cities of the first class, whether now in that class or hereafter coming into it; and, as said, in no other way could the Legislature provide for the government of a city when no other city of its class is in the State, than by a general law. The Constitution, by section 156, requires the Legislature to divide the cities of the State into six classes, and assign to the first class cities with a population of 100,000 or more. As long as there is only one

city of 100,000 population in the State, there can be but one city of the first class, but in the meantime the Legislature must provide by general law for the government of cities of the first class. The owner of property must know whether he has paid his taxes or not, and when he is sued for the payment of the taxes on his property there is no reason that the Legislature may not provide that irregularities in the assessment shall not avail him to escape the payment of his public dues, when there is enough in the assessment to show the property taxed. Some of the property in the case before us was assessed in the name of R. W. Woolley, trustee, some in the name of Mary E. Woolley, and some of it, after her death, in his name and the children's. Any of these assessments were sufficient, under the statute; the property being plainly identified by the number of the lot and block as marked on the assessor's maps, all of which is shown by the proof. *Board of Councilmen of Frankfort v. Farmers' Bank*, 108 Ky., 766 (22 R., 1738), (61 S. W., 458).

8. Section 2998, Kentucky Statutes, in so far as it allows taxes to be collected by suit in cities of the first class, is special and local legislation, and unconstitutional.

Similar provisions are made for suits to collect taxes, and for interest on them, in other classes of cities. See Kentucky Statutes, sections 3187, 3396, 3546, 3644. The constitutionality of these statutes has often been recognized by this court. *Louisville Bridge Co. v. City of Louisville*, *supra*; *Board of Councilmen of Frankfort v. Farmers' Bank*, *supra*.

9. The corporation known as the "Commissioners of the Sinking Fund of the City of Louisville" no longer exists, and the taxes levied for its benefit can not be collected.

The original act creating the board of commissioners of

the city of Louisville became a law on March 9, 1867; and by section 3010, Kentucky Statutes, it is provided: "The sinking fund to pay the bonded debt of the city is hereby continued as established by law. Whenever it is apparent to the board of commissioners of the sinking fund of any city of the first class that the revenue and available assets of said sinking fund will be insufficient to pay, when due, any future maturing bonds of said city then issued and chargeable to said sinking fund, without unduly impairing the assets of the sinking fund, and the said commissioners of the sinking fund shall certify this fact to the general council of said city," etc. In sections 3011-3024 other duties of the sinking fund commissioners are prescribed. By section 2979 it is provided: "All taxes already levied or imposed under existing laws and not yet paid remain payable, unless the contrary be hereinafter provided." In a number of cases decided since this act was passed, the existence of the sinking fund commissioners of the city was upheld or recognized. *Farson, Leach & Co. v. Board of Commissioners of Sinking Fund*, 97 Ky., 119 (16 R., 856), (30 S. W., 17); *Commissioners v. Grainger*, 98 Ky., 319 (17 R., 901), (32 S. W., 954); *Same v. Zimmerman*, 101 Ky., 432 (19 R., 689), (41 S. W., 428). There was an obligation on the city to pay its debts. The taxes levied for the benefit of the sinking fund are, in substance, levied for the payment of the debts; and the fact that they were made payable to the sinking fund commission does not affect in any manner appellant's liability, for the council was required to make a levy to meet the obligations of the city, and the form in which the levy was made did not prejudice appellants.

10. There was no election by the board of aldermen of a board of equalization by a *viva voce* vote.

Appellants do not show that they made complaint of any assessment. Section 2994, Kentucky Statutes, reads: "If in any year a legal board of equalization is not elected or fails to meet or fails otherwise to perform any essential act, or if in any year the assessment books should not remain open for the requisite time, the tax bills shall not thereby become void; but when any tax payer in such a case complains of the assessment upon him such a board shall then be chosen in the manner indicated or the board theretofore chosen shall meet, as the case may be, and hear all complaint in the manner stated; and the collection of tax bills from those so complaining shall be suspended till the board has heard and disposed of their complaints." Under this statute the objection that the board of equalization was not properly elected is unavailing. *Crecelius v. City of Louisville*, supra; *Fonda v. City of Louisville*, supra; *Powell v. Same*, supra.

11. The court sustained a demurrer to the petitions in actions Nos. 18,257, 18,258, 18,262 and 18,534, but gave judgment on these petitions without amendment.

In actions Nos. 18,257, 18,258 and 18,262, there was an order filing a demurrer of the defendants to the first, second and third paragraphs of the petition. The demurrer was sustained in the first and second paragraphs, and overruled as to the third. Plaintiff was given leave to amend the petitions and reparagraph the same on the face of the papers. The three cases were then consolidated. The petitions as copied in the transcript are in one paragraph, and really set out but one cause of action. We must assume, therefore, that the plaintiff amended its petitions by striking out so much of them as divided them into paragraphs. After the consolidation there was an order entered overruling the defendants' demurrer to the petition. This or-

der should be treated as made in the consolidated actions, as these cases were consolidated with the other cases, and, after the consolidation, pleadings going to the merits were filed both by the defendants and by the plaintiff. In action No. 18,534 the defendants' demurrer to the petition was overruled.

12. Mrs. Woolley owned only a life estate in certain lots, and limitation bars the remainderman.

The deed under which these lots were held is not produced in evidence, although the condition of the title was denied. R. W. Woolley stated that the title was conveyed by James C. Johnston to Mrs. Woolley for life, who then had had no children, with remainder to her heirs. It could not be known who would be the heirs of Mrs. Woolley until she died, and therefore her children were not necessary parties to the suit in her lifetime. They were made parties soon after her death, and the cause of action against them did not accrue until her death.

13. The court erred in prescribing the manner in which the property should be sold.

Our statutes confer upon the chancellor very broad discretion in enforcing tax liens. It is provided: "All tax bills uncollected in whole or in part . . . shall be deemed a debt from such person to said city arising as by contract and may be enforced as such by all remedies given for the recovery of debt in any court of the Commonwealth otherwise competent for that purpose." Kentucky Statutes, section 2998. "The action herein authorized and the judgment and subsequent proceedings therein, except as hereinafter excepted, shall be conducted in all respects like suits upon liens arising from contracts, and the court shall have jurisdiction of all suits for taxes irrespective of amount." Section 3005. "From the beginning of the ac-

tion a lien for each tax bill assessed against the same owner or set of joint owners shall also arise upon every piece of land or improvement still owned by him or them with a view to the sale of less than all the pieces for all the tax bills subject to the marshalling of burdens as against third parties, as the rules of equity may require." Section 3006. Under these provisions the court did not err in directing a sale of so many of the lots as might be necessary to make the judgment, which was really less oppressive on the defendants than to order parts of the lots to be sold. Section 3007, Kentucky Statutes, relates to the collection of taxes due by infants and persons of unsound mind, and is properly thus headed by the editors. It reads as follows: "The goods of infants, or persons judicially found to be of unsound mind, shall not be distrained for the taxes assessed on their lands or improvements; nor shall their lands, during their disability, be sold for less than two-thirds of their appraised value on any judgment of sale rendered for taxes and cost alone, when these lands or improvements have come to them through descent, distribution or devise, or the gift of settlement of some person then deceased, or have belonged to persons of unsound mind before they became such; nor shall, for taxes chargeable to the owner of the particular estate, the entire estate be sold for taxes and costs alone at less than two-thirds of the appraised value, so as to defeat the reversions, remainders, or future estates while any future estates are outstanding, unless the reversioners or remaindermen are ascertained and are of full age; nor shall such entire estates be put up to sale, unless the particular estate of the taxpayer has first been put up and has failed to bring the amount of the taxes and costs." The section first provides as to the goods of infants and per-

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sons judicially found to be of unsound mind; then as to their lands coming to them from some person who was of unsound mind or is deceased. It then takes up the state of case where these persons own the remainder, and another the particular estate, and forbids a sale at less than two-thirds of the appraised value where the remaindermen are not ascertained or of full age, and then provides that such estate (that is, those estates as are referred to in the last clause, in which the reversioners or remaindermen are not ascertained or of full age) must not be put up to sale unless the particular estate has first been put up and has failed to bring the amount of the taxes. In other words, where the remaindermen are not ascertained or of full age the entire estate can not be sold for taxes and costs alone at less than two-thirds of its appraised value, and the particular estate of the taxpayer must be first exhausted, and fail to bring the amount of the taxes, before the estate of the remaindermen is sold. The section has no application to sales where the remaindermen are ascertained and are of full age.

At the conclusion of the judgment is this clause: "The court reserves power over the distribution of the fund arising from the sale as above ordered to the parties respectively entitled thereto." If it shall turn out, when the sale is made, that any injustice is done the remaindermen, the court can adjust this matter between them and the life tenant, and direct him to contribute to them as the ends of justice require. But the city has a lien upon the remainder as well as the particular estate of the lots ordered to be sold as the property of the life tenant and the remaindermen, and, in view of all the facts, we do not see that any substantial injustice has been done any of the parties by the decree complained of. It is true that to

throw 15 years' taxes upon the property at one time is to place upon it a great burden; but property is itself only the creature of civilized society, and taxes are the contributions made by property owners to society for its protection which they enjoy. He who enjoys the protection of society in the security of his property, without discharging his part of the common burden of maintaining the social system, violates the constitutional rule that taxes shall be uniform and equal. He not only reaps where he has not sown, but he places upon others the burden which his property ought to bear, for, as the social system must be maintained, others must pay the part that in right should be paid by him. There is therefore only apparent hardship in the judgment and no real injustice. It is shown by the proof that no taxes have been paid on appellants' property since about the year 1875, although, as stated, it was adjudged that the city be enjoined from collecting taxes prior to March 31, 1884.

14. Certain paragraphs of the petitions were defective.

These defects were cured by the subsequent leadings, and by the proceedings had in the consolidated action.

Judgment affirmed.

Judge Barker not sitting.

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CASE 63—ACTION BY CITIZENS' SAVINGS BANK AGAINST J. P. MORELAND'S ADMR. AND OTHERS ON A BILL OF EXCHANGE.—JAN. 21.

Moreland's Admr., &c. v. Citizens' National Bank.

APPEAL FROM DAVIESS CIRCUIT COURT.

JUDGMENT FOR PLAINTIFF AND DEFENDANTS APPEAL. AFFIRMED.

BILL OF EXCHANGE—NOTING OF PROTEST—ASSIGNMENT OF DRAWER—NOTICE—EXCEPTION WAIVED.

- Held: 1. The words "Protested for non-payment" endorsed by a notary on a bill of exchange, and in addition the day of the month and the year and signed by the notary, is a sufficient noting of protest.
2. After the notary had written the instrument of protest he destroyed a slip of paper on which he had noted the protest as a memorandum from which to write the instrument of protest. The destruction of this slip, whether done purposely or accidentally did not invalidate the protest.
3. Though, between the drawing and maturity of a bill of exchange the accommodation drawer makes an assignment for the benefit of creditors, notice of protest to him alone is sufficient.
4. The words in a bill of exchange, "one hundred and eighty days pay to the order of," import that it is due 180 days after date.
5. No exception having been filed to the report of commissioner and no question made as to its correctness except in the brief in this court, it is too late to raise the question here.

W. S. PRYOR, FOR APPELLANT.

The bill sued on in this case was payable in 180 days, and in order to avoid the effect of the demand and protest for non-payment, the court below has interpolated in the bill the words "after date."

We perceive no reason for adding to the obligation of this commercial paper, words not inserted by the parties to it. There is no ambiguity in the writing and a plain note payable in 180 days must mean what it says on its face. In computing time on the assumption that the paper reads as the parties intended it should, the day on which it was executed is counted as one of the 180 days, and not being protested until September 28,

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1892, makes it one day too late, (the paper having been drawn March 29, 1892). The authorities on the points raised are all found in the able brief of Messrs Walker & Slack, and it seems to me the argument they adduce is unanswerable.

WALKER & SLACK, FOR APPELLANT.

SYNOPSIS.

1. By appellee's charter, each bill of exchange in this record is placed upon the footing of a foreign bill of exchange. 2 Acts, 1883-1884, sec. 4, p. 1191.

2. In order to fasten liability upon an accommodation drawer or indorser upon a foreign bill of exchange, or one placed upon its footing, it is essential that the notary write out on the very day of its maturity, when dishonored, the protest *in extenso*, or make a noting or initial protest, which is a minute consisting of all the steps taken, and so complete as to exclude the exercise of memory, and from which alone the extended protest may be written out on a subsequent day. Walden, &c. v. Citizens' Savings Bank, (Ky.) 43 S. W., 488, 495 and 498; 2 Daniel on Neg. Inst (4 ed.) secs. 939 and 940; N. 5, p. 12, Byles on Bills (250) 396; Glaque's Manual, pp. 173 and 174; 2 Am. and Eng. Ency. of Law, 406 and N. 3; Read v. Bank of Ky., 1 Mon., 93; Bally v. Dozier, 6 How. (U. S.) 23; 16 U. S., 588 and 589.

This law "is founded on reason and the necessities of trade. It exacts nothing harsh, unjust or unreasonable," and its strict observance is essential in determinations concerning mercantile paper, and in fixing the liability of drawer and indorser. Denniston v. Stewart, 17 How. (U. S.), 606; 21 U. S., 723; Sebree Deposit Bank v. Moreland, 96 Ky., 157 and 158.

3. Evidence of the habits and customs of a notary is relevant to show that a particular act was done by him in accordance with such habits and customs, and the presumption that it was done in a way different from his usual course of business is illogical, and never allowable. Lawson on Usages and Customs, p. 81; Miller v. Headly (5 Johnson, 375), 4 Am. Dec., 372; Union Bank v. Stone, (50 Maine, 595), 79 Am. Dec., 635; Shove v. Willey, 18 Pick., 561; Smith v. Montgomery, 5 Mon., 502; 7 Am. and Eng. Ency. of Law, 63.

4. Where the matter is in issue a presumption that an officer performed his duty is never indulged, but is determinable only by the evidence logically relevant. McKelvey on Evidence, (Hornbook Series), 53.

5. Where a drawer or indorser has made an assignment under State insolvent laws, and the holder or notary knows of it at the time of protesting, notice of protest must be given to the

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assignee in order to hold the estate in the hands of the assignee liable. Callahan, &c., v. Bank of Kentucky, (82 Ky., 231), 3 Ky. Law Rep., 188, 191 and 194; 3 Randolph on Com. Paper, secs. 1243 and 1330; American National Bank v. Junk Bros. Lumber and Manufacturing Co., (Tenn.), 30 S. W., 755.

6. Where computation of time is to be made from the act done, the day on which it is done must be included; but if to be made after or from the day itself, the day must be excluded. Moor v. Cov. Bank, 80 Ky., 305; Chiles v. Smith, 13 B. Mon., 461; Hardley v. Cunningham, 12 Bush, 401; Wood v. Com., 11 Bush, 220.

7. Where the matter of usury is a principal fact in issue, it is determinable according to the evidence, and exceptions to the commissioner's report are not necessary or required as in cases involving settlements of estates.

8. The entries in the books of a bank can be proved only by the party who made them, or, in case of the death or absconding of such party, by some one acquainted with his handwriting, and exact copies must be produced. Walden, &c. v. Citizens' Savings Bank, (Ky.) 43 S. W., 497; Poor, &c. v. Robinson, &c., 13 Bush, 294 and 295; Bank v. Smith, 9 B. Mon., 611.

9. In actions against drawers or indorsers, notice must be averred and proved, and can not be presumed to have been given, and the burden is upon the holder to show that they were notified in due time. 2 Am. and Eng. Ency. of Law, 413; Id., 407, n. 3, and 409, n. 11. 3 Randolph on Com. Paper, secs. 1250 and 1204; 2 Id., secs 760 and 1219; 2 Dan'l on Neg. Inst., sec. 972.

10. In giving notice of protest, the notary acts as an officer, and is liable for negligence on his official bond. 3 Randolph on Com. Paper, sec. 1237, pp. 263 and 264; 2 Dan'l on Neg. Inst., sec. 991, p. 50 and N. 5; Todd v. Edwards, &c., 7 Bush, 94; Neal & Co. v. Taylor, 9 Bush, 382 and 383; Mulholland & Bro. v. Samuels, 8 Bush, 63 and 64.

J. A. DEAN, ATTORNEY FOR APPELLEE.

1. The written opinion of the lower court in reference to the bill dated March 29, 1892, payable one hundred and eighty days, the words "after date" being omitted, is as follows: "I am of the opinion as a matter of law that the contention of defendants is hypertechnical. I conclude the meaning and intent was to make it 180 days after date, and it was so understood by the parties, and "after date" was inadvertently omitted."

We think this court will concur in that conclusion.

2. We contend that the memorandum of the notary from which

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to write up the certificate of protest, is of no further value after the protest was extended by writing up the certificate of protest, and its further preservation was not necessary; the certificate then becoming the evidence of the protest and not the memorandum.

3. The commissioner in his report, ascertained the amount due on each bill, after eliminating usury, to which no exceptions were filed, and same was confirmed and judgment rendered thereon, and we contend it is too late now, even if any error was committed, to raise objection thereto.

AUTHORITIES CITED.

Citizens' Savings Bank v. Hays, 96 Ky., 365; Murphy v. Citizens' Savings bank, 22 R., 1672; Read v. Bank of Ky., 1 Mon., 93; Young v. Bennett, 7 Bush, 474; Daniel on Negotiable Instruments, 926, 927, 939.

OPINION OF THE COURT BY JUDGE PAYNTER—AFFIRMING.

The issue herein arises over certain bills of exchange. There is no issue as to the drawing, acceptance, and indorsement of them. In this action it is sought to hold the accommodation drawer and indorser responsible on them. The payment is sought to be avoided by the drawer and indorser of same on the grounds that the law was not observed in noting protest, giving notice of protest, and writing the instruments of protest by the notaries public. Two of the bills over which there is a controversy are for \$5,000 each, one for \$3,685, one for \$3,000, and one for \$3,200. These bills were drawn by J. P. Moreland, accepted by S. D. Walden, and indorsed by J. P. Fuqua. It appears that the bills (unless the one for \$3,685 was not) were protested on the days that they matured. As to that bill it is insisted that it was not protested until the day after its maturity. That defense is interposed in addition to the others heretofore stated. I. N. Parish, notary public, protested the bills for \$5,000 each on the days of their maturity, and indorsed on them. "Protested for nonpayment," and, in addition to that, gave the day of the month and year, to

which indorsement he affixed his official signature. W. H. Moore was the notary who protested the bill for \$3,000 and the one for \$3,200. No memorandum noting the protest was left attached to either of the bills by the notary, nor was such indorsement made upon them. Either on the day the bills were protested or on a subsequent day the instruments of protest were written, but the evidence leaves no doubt that the notices of protest were duly mailed to the drawer and indorser of the several bills on the days they were protested.

The first thing which we will consider is whether the noting by Parish was sufficient. The authorities seem to be agreed that the noting of initial protest was unknown to the law as distinguished from the protest, but that it has grown into practice within recent years. It seems to be well established that, if the instruments of protest are not written shortly after the demand and protest, the noting or initial protest is necessary as a basis for the instrument of protest. 2 Dan. Neg. Inst. (4th Ed.), section 939. This court in *Read v. Bank*, 1 T. B. Mon., 93, 15 Am. Dec., 86, had under consideration the question as to the necessity of noting. The court said: "The protest was drawn up so soon as the ordinary course of business would permit, or at least in sufficient time to supersede the necessity of noting the bill at the moment." The court seemed to be of the opinion that, if the instrument of protest was written as soon as the ordinary course of business would permit, or at least in sufficient time to supersede the necessity of noting the bill at the moment, then those sought to be held liable were bound. We are of the opinion that the indorsements which Parish made on the bills were sufficient.

The facts as to the bills protested by Paris differ somewhat from those protested by Moore. We will not go into

the discussion of the question of the competency of evidence to prove the course of business of notaries in protesting paper; neither is it necessary for us to determine whether the instruments of protest were written on the day the bills matured, or on a subsequent day; hence the necessity is obviated of determining whether the proof is sufficient to impeach the dates of the instruments of protest, they bearing dates that the bills matured. If the noting of protest was made, the instruments of protest could have been prepared thereafter. Moore testified that when he protested the bills he attached to each of them a memorandum showing the protest, but when the instruments of protest were written he destroyed it, as he had no further use for it. Counsel for appellee urges that the preservation of these slips was essential to the validity of the protest *in extenso*, as they form a necessary part of the record in establishing the steps that must be taken in order to fix liability upon the drawer and indorser. The object of noting is to have a record from which the instrument of protest can be written, so a notary will not be required to rely upon his memory as to the facts. If the noting was made, the destruction of it, whether it was purposely or accidentally done, could not invalidate the instrument of protest which was based upon it. It preserves the right of the notary to prepare that instrument, and, when done, the essential steps have been taken to fix the liability upon the accommodation drawer and indorser. The bill having been protested for non-payment and notice having been given to the drawer and indorser, the noting having taken place, and the instrument of protest having been executed, the liability of the drawer and indorser was fixed. The destruction of the paper upon which the noting was made could not relieve them of the

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liability that had attached by the necessary act of the notary.

After the several bills were drawn, and before their maturity, Moreland made an assignment to E. P. Taylor for the benefit of his creditors. When the bills were protested, notices of protest were not sent to the assignee, but to Moreland. It is insisted that, as the assignee accepted the trust, and qualified as such assignee, notices of protest should have been given to him, instead of to Moreland, in order to bind the trust estate. The exact question here presented has not been before this court, although this court, in *Callahan v. Bank*, 82 Ky., 231, 6 R., 188, held that notice of the dishonor of a bill to one who is the assignee of the payee was sufficient. But the court said: "We must not be understood as determining whether a notice of the dishonor of negotiable paper sent to the bankrupt or insolvent alone, and not to the assignee, would or would not be sufficient, as that question is not presented in this case." The text-writers upon this question are extremely unsatisfactory. 1 Pars. Notes & B., 500, in speaking of the person to whom notice of protest should be given in the case of a bankrupt, says: "That perhaps the notice should be given to the assignee, if the holder knows or might know, by the exercise of due diligence, that the estate is in his hands:" but he adds: "But notice might perhaps even then be sufficient if given to the bankrupt." Byles, Bills, page 216, says: "If the drawer of the bill become bankrupt, notice must nevertheless be given to him, in all events, before the choice of assignees. If the assignees are appointed, perhaps notice should be given to them." Daniel, Neg. Paper, section 1002, says: "If the party be bankrupt, it is best to give notice to him, and to his assignee also. If there be yet no assignee appointed, notice to him

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is sufficient, and perhaps it might be sufficient, even if one had been appointed. If given to the assignee alone, it would probably be sufficient." When a party assigns all of his property for the benefit of his creditors and places it in the hands of a trustee for distribution, all of his creditors are entitled to participate in the distribution of it. This is true whether the debts have matured or not. Moreland's liability on these bills existed at the time of the assignment, and, if it was preserved, then the holder of them was entitled to participate in the distribution of the proceeds of the assigned estate. He being personally liable to the holder, it was important to it that he receive notice of protest that that liability might be preserved. When that liability was preserved, it seems to us to necessarily follow that the holder of the bills is entitled to participate in the trust estate, because the very purpose of his assignment was to pay his liabilities in full or pro rata, as the case may be. We conclude that notice to Moreland was sufficient to preserve his liability, and, if his liability continued, there is no escape from the conclusion that the holder of the bills which evidenced it was entitled to participate in the distribution of the estate.

The bill for \$3,685 reads as follows: "Citizens' Savings Bank, Owensboro, Ky., Mch. 29, 1892. \$3,685.00. No. 14,773. One hundred and eighty days pay to the order of J. A. Fuqua, negotiable and payable at Citizens' Savings Bank, thirty-six hundred and eighty-five dollars, for value received, with interest at ten per centum per annum after maturity, until paid, and charge to account of J. P. Moreland. To S. V. Walden, City." The note was protested upon the idea that the bill was payable 180 days after date. It is insisted for the appellant that it was due within 180 days. In our opinion, the words import that the bill was due

180 days after date. It is often necessary for a court, by construction, to supply words obviously omitted through oversight, to give an instrument the meaning manifestly intended. In order to construe it as meaning within 180 days, we would have to supply the word "within." We know, from the customary way of drawing such instruments, that they are usually payable at the time specified after the date upon which they are drawn. The parties did not mean that the money should be paid on or before 180 days, and, if we should hold that it was to have been paid within 180 days, we should, in effect, hold that it was to be paid on or before 180 days.

The commissioner to whom the case was referred to purge the bills of usury made a report showing that he had done so. No exceptions were filed to the report, and no question made as to the correctness of it, except in the brief in this court. It is too late to raise the question. It was the duty of the appellants, had there been a correction which should have been made in the report of the master commissioner, to have called the lower court's attention to it, so that he could have had an opportunity to make the correction. Besides, we fail to find an error in the report of the master commissioner.

The judgment is affirmed.

Petition for rehearing by appellant overruled.

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CASE 64—GEORGE COOK WAS CONVICTED OF MURDER AND APPEALS.—
JAN. 23.

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APPEAL FROM BELL CIRCUIT COURT.

DEFENDANT CONVICTED OF MURDER AND APPEALS. AFFIRMED.

MURDER—IRRELEVANT EVIDENCE—HARMLESS ERROR—ABSENCE OF
COUNSEL—MOTION FOR CONTINUANCE.

- Held: 1. Defendant in a murder case is not prejudiced by admission of testimony of a quarrel between two other persons, in which one said he would kill the other.
2. A conviction for murder will not be reversed because a second continuance for, as alleged, the unexpected absence of counsel, was not granted, such counsel never having appeared in the case, and the evidence warranting the assumption that nothing more than was done could have been done by the absent counsel.

N. B. HAYS, ATTORNEY FOR APPELLANT.

1. The writer of this brief was counsel for appellant at the time he was convicted and defended him on said trial, but he was not his original counsel in the case, although he was the attorney for other defendants jointly indicted with appellant, some of whom had been previously tried and convicted and others acquitted. Appellant's defense was an alibi which he could not prove by any one but himself, being at home at the time of the murder with his wife and four small children. When his case was called for trial he filed an affidavit for a continuance, which, in so far as it relates to the absence of his attorney, reads as follows: "That prior to this term of the court he employed Judge S. E. Baker, who lives in Letcher county, Ky., as one of his counsel, and paid him part of his fee to defend him in the trial of this case. That said Baker is a good lawyer and a skillful practitioner, and he is the only lawyer he has employed, or to whom he has confided his defense, or relied on to defend him; that there are two other counsel in the case but he has not feed or relied on either of them to defend him, and they were feed by the other defendants to make their defense. That he can not safely go to trial without the service of said Baker, who is absent without the procuring or con-

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sent of this affiant and against his will, and he believed and relied upon him to be present, and expected him to be here. That said Baker is now more than 130 miles from this place, most of the distance to be traveled horse back or on foot. That he makes this affidavit not to delay the case but to procure justice and a fair trial."

A demurrer was sustained to the affidavit and appellant's motion for a continuance overruled which we think was error.

2. On the trial two witnesses were permitted to detail to the jury a difficulty between Mack Yontz and Samuel Vanover (before the killing of Mrs. Hall, of which appellant was accused) in which they were permitted to state to the jury that Yontz said to Vanover, "He would kill him." Yontz, being one of the men who had been convicted of the killing of Mrs. Hall, and Vanover is the man who was at Mrs. Hall's when the offense was committed, we claim that this testimony was incompetent and prejudicial to appellant.

CLIFTON J. PRATT, ATTORNEY GENERAL, AND M. R. TODD, FOR COMMONWEALTH.

1. The trial court has a sound legal discretion in granting or overruling a motion for a continuance.

2. The facts disclosed in this record show that appellant was represented by able counsel who had been retained by a number of the parties indicted and who was familiar with the material facts, and who was able to and did present his defense in the most favorable light, being a lawyer of ability and wide influence in Bell county in which the trial was had.

3. We submit that the threat made by Yontz to Vanover having been made in the presence of Mrs. Hall and in the presence of others engaged in the conspiracy to kill her, was competent evidence under the rule, "when there is sufficient evidence to justify the conclusion that several persons were acting with a common purpose to commit a crime, although there is no proof of a previous combination to commit the offense in question, the conduct and actions of the several parties and the parts they performed are sufficient to make the declarations of each evidence against all the parties." *Abbott's Trial Brief*, 447; *Kelly v. People*, 55 N. Y., 565; *People v. Van Tassel*, 156 N. Y., 561; *Hall v. State*, 3 Lea., 552.

OPINION OF THE COURT BY JUDGE BARKER—AFFIRMING.

The appellant, George Cook, and a number of other persons, were indicted by the grand jury of Letcher county, Ky., charging them with the murder of one Jemima Hall.

Subsequently a change of venue was had, and the case transferred to Bell county, Ky., for trial. Appellant's case was called for trial at the May term, 1902, of the Bell circuit court, and appellant was convicted of wilful murder, and his punishment fixed at confinement in the penitentiary for the term of his natural life. The motion for a new trial having been overruled, and the defendant sentenced, he has appealed to this court for a reversal of the judgment against him. In support of his contention that this case should be reversed, appellant's counsel urges but two grounds: First, that the court erred in overruling appellant's motion for a continuance of the case; and, second, that the court erred in admitting incompetent testimony during the trial. The second objection is based upon the fact that the court permitted Robert Johnson and Bury Toliver to detail to the jury the circumstances of a difficulty between Mack Yontz and Samuel Vanover some time before the killing of Jemina Hall, in which they stated to the jury that Yontz said to Vanover that "he would kill him." We fail to see how the admission of this testimony prejudiced appellant, or in any wise affected him, conceding it to have been incompetent. It in no wise connected appellant with the quarrel in question, and therefore could not prejudice the minds of the jury against him.

The first ground—that the court erred in refusing to grant appellant a continuance because of the absence of his counsel, Judge S. E. Baker—is the one upon which appellant's counsel really rests his hopes of a reversal. Upon the calling of the case for trial, appellant announced that he was not ready for trial, and filed his affidavit in support thereof, in which he set out two grounds of continuance—one because of the absence of certain witnesses, and the second because of the absence of his counsel, Judge S. E.

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Baker. The first ground is immaterial, because the Commonwealth's attorney permitted the affidavit to be read as a deposition. The second ground in the affidavit, so far as it relates to the absence of appellant's attorney, is as follows: "That prior to this term of court he employed Judge S. E. Baker, who lives in Letcher county, Ky., as one of his counsel, and paid him part of his fee to defend him in the trial of this case; that said Baker is a good lawyer, and a skillful practitioner, and is thoroughly acquainted with the evidence in this case, and he is the only lawyer he has employed, or to whom he has confided his defense, or relied upon to defend him; that there are two other counsel in the case, and they were feed by the other defendants to make their defense; that he can not safely go to trial without the services of said Baker; that he is absent without the procuring or consent of this affiant, and against his will, and he believed and relied upon him to be present, and expected him to be there; that said Baker is now more than 130 miles from this place, most of the distance to be traveled horseback or afoot; that he makes this affidavit not to delay the case, but to procure justice and a fair trial." In support of the first ground for reversal, appellant relies upon the cases of *Bates v. Com.*, (13 R., 135) 16 S. W., 528; *Leslie v. Com.*, (19 R., 1201) 42 S. W., 1095, and *Cornelius v. Com.* (23 R., 771) 64 S. W., 412. In the case of *Bates v. Com.*, the appellants were indicted, tried, convicted and sentenced within 24 days, and in that case the affidavit for a continuance showed that their attorney was necessarily detained by his duties as an officer of the United States, and that, while he could not be present on the day fixed for the trial, he could be present by the second day thereafter. Under these circumstances, the court properly held that the trial judge abused his judicial discre-

tion in failing to afford appellants the opportunity of having their counsel present; and Judge Holt, who delivered the opinion of the court, said: "We do not, of course, mean that the trial court has no discretion in the matter of continuances. It is, however, a legal one, and, if it be so exercised as to deprive the accused, when not in fault, of a fair trial, justice requires that he should not be remediless. . . . While a speedy transaction of judicial business is to the interest of the public, yet it should never be had at the expense of justice, which must always be regarded as the paramount purpose of judicial investigation. It is true cases should not ordinarily be continued upon the sole ground of absence of counsel." In the case of *Leslie v. Com.*, supra, Judge DuRelle, after showing in his opinion several sufficient reasons for reversal of the case, seems to have thrown as an additional weight in the scales this expression: "Moreover, the unexpected absence of appellant's local counsel on the morning of the trial, without any notice to him, would appear to afford ample reason why a continuance should have been granted." It does not appear that this case would have been reversed alone for the reason that appellant's local counsel was unexpectedly absent. And in the case of *Cornelius v. Com.*, supra, Judge White, after stating several good and sufficient reasons for the reversal of the case, adds the additional one that "appellant was entitled to a continuance on the ground of the unexpected and unavoidable absence of his principal counsel." In no case that we have been able to find, or which has been cited to us by counsel, has this court ever reversed alone upon the ground that the trial judge refused a continuance because of the absence of counsel, and Judge Holt, in his well-considered opinion in the case of *Bates v. Com.*, supra, states the rule to be

that "cases should not ordinarily be continued upon the sole ground of absence of counsel." In the case of *Stephens v. Com.* (9 R., 742) (6 S. W., 456), it is said that the absence of one or two or more of the counsel employed by the defendant in a criminal prosecution can not be sufficient reason for continuing the trial until the next term, especially when it does not clearly appear that a fair trial can not be had without his presence. Such a practice would frequently result in an indefinite postponement of criminal trials. In the case of *Brown v. Com.*, 7 Ky. Law Rep., 451, it is said: "To authorize a continuance on the ground of the absence of one of several attorneys, there should be some assurance that he will be present at the next term; and a continuance should never be granted on that account unless it appears that the ends of justice requires the presence, at the trial, of that particular person selected by the defendant and his counsel, and a fair and impartial trial can not be had without him." In the case at bar there had already been one continuance, as shown by the affidavit of appellant, and it nowhere appears that the absent counsel was on hand when the case was called for trial at that time; and it is a significant fact that the absent counsel, so necessary, according to the language of the affidavit, has never appeared in this case, except in the affidavit for the continuance. The record shows that the counsel who is representing appellant in this court also represented him on the trial in the court below, and it shows, moreover, that appellant's defense was conducted in a most thorough and masterly manner. We do not believe that the absent counsel could have done anything for appellant that was not done for him by the learned counsel who appears for him at this bar.

Appellant's defense was an alibi, and he introduced no

evidence in support thereof but his own testimony. There is nothing in such a defense that the present counsel could not have understood as well as the absent counsel, and we are not willing to say that, under all the circumstances, appellant has not had an impartial trial. The learned judge who presided upon the trial is eminently distinguished for impartial fairness and a love of justice. He was in a position to understand, from all the surrounding circumstances, better than this court, the merit of the motion for a continuance, and we will not say that he has abused the large discretion intrusted to him by the law, unless it is apparent from the record that appellant has been deprived of a fair and impartial trial by the ruling upon this question. The evidence in this case abundantly justifies the verdict of the jury, and fully warrants the assumption, on our part, that nothing additional could have been done for appellant by his absent counsel. It is not necessary to state the evidence in detail, but it convinces us that appellant was guilty of one of the most heinous, cruel, and wanton murders that has ever disgraced the criminal calendar of this Commonwealth. The Commonwealth has been forced, at great expense, to bring the witnesses from a long distance. Appellant had already had one continuance, and we do not think that the lower court erred, under all the circumstances, in overruling the motion for a continuance; wherefore the judgment is affirmed.

Arnett v. Commonwealth.

CASE 65—ELLIOTT ARNETT WAS INDICTED FOR MURDER AND CONVICTED OF VOLUNTARY MANSLAUGHTER AND APPEALS.—JAN. 28.

Arnett v. Commonwealth.

APPEAL FROM MAGOFFIN CIRCUIT COURT.

DEFENDANT CONVICTED OF MANSLAUGHTER AND APPEALS.—AFFIRMED.

HOMICIDE—INDICTMENT—CONTINUANCE—AFFIDAVIT FOR—DYING DECLARATIONS—COMPETENT WHEN MADE TO WIFE.

Held: 1. It is too late to question an indictment for murder as not alleging that the killing was feloniously committed on an appeal from a conviction of manslaughter.

2. Where an affidavit in support of a motion for a continuance of a criminal prosecution failed to state that the witnesses were not absent by accused's consent or procurement, or where they were, or what grounds existed for the expectation that their testimony could be procured, and the facts to be proven would not have been competent, the continuance was properly refused.

3 A witness giving evidence of a dying declaration in a criminal prosecution testified that decedent said to her several times after he was wounded that he did not expect to live; that he made the declaration on the day he died, and said in the same conversation that his time was short; and that previous to the declaration he had been gradually sinking for several days. HELD, to sufficiently show consciousness of impending death.

4. Civ. Code, section 606, provides that the wife shall be incompetent to testify, even after the cessation of a marriage relation, to any communication made to her by her husband during marriage. HELD, that a wife was competent to testify to her husband's dying declaration in a prosecution of his alleged murderer, notwithstanding this statute.

D. D. SUBLETT, JAMES ANDREW SCOTT AND B. G. WILLIAMS,
FOR APPELLANT.

1. It can not be reasonably contended that appellant was guilty of murder, the evidence abundantly showing that deceased brought on the difficulty, therefore, the instruction giving the jury the right to find appellant guilty of murder was prejudicial, because it gave a false coloring to the case, caus-

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ing the jury to look upon it with greater enormity than they otherwise would.

2. The testimony of the wife of deceased as to statements made by him to her in the nature of a dying declaration was incompetent, and, coming as it did from the mourning widow of deceased, was, as it were, a voice from the grave, and therefore highly prejudicial to the appellant.

3. The indictment is defective.

4. The court erred in refusing to grant a continuance to appellant or to permit his affidavit to be read to the jury as the evidence of the absent witnesses.

5. Even if the wife was a competent witness, we contend that the statements made by deceased to her were not up to the rule of "dying declarations."

AUTHORITIES CITED.

Civil Code, sec. 606; *Com. v. Sapp*, 90 Ky., 584; *Greenleaf on Evidence*, sec. 334, note (a) and sec. 158; *Kaelin v. Com.*, 84 Ky., 354; *Stroud v. Com.*, 14 R., 179; *Star v. Com.*, 16 R., 843; Criminal Code, sec. 189; *Dulaney v. Com.*, 18 R., 212; *Pace v. Com.*, 89 Ky., 204; *Vaughn v. Com.*, 86 Ky., 431.

CLIFTON J. PRATT, ATTORNEY GENERAL, AND M. R. TODD, FOR COMMONWEALTH.

1. Counsel objects to the indictment because the word "felonious" is not included as one of the words qualifying the offense. The court will see from the record that no demurrer was filed to the indictment, there was no motion in arrest of judgment, and this ground is not mentioned in the motion for a new trial. If an indictment charges a public offense, although it be bad on demurrer, it is good after verdict. *Bronaugh v. Com.*, 2 Rep., 386; *Baldwin v. Com.*, 2 Rep., 439.

2. The failure of the court to grant a continuance is not presented in the grounds for a new trial.

3. The widow of deceased was a competent witness as to the dying declarations of her husband, and it is clearly shown that the declarations made to her were made under a sense of impending death. *Com. v. Matthews*, 89 Ky., 287; *Peoples v. Com.*, 87 Ky., 487.

4. The verdict for manslaughter shows that the substantial rights of the accused were not prejudiced by giving the instruction for murder even if it be conceded that the evidence was not sufficient for such an instruction. *Galloway v. Com.*, 7 Rep., 166; *Dunlap v. Com.*, 18 R., 212.

OPINION OF THE COURT BY CHIEF JUSTICE BURNAM.

The appellant, Elliott Arnett, was convicted of voluntary manslaughter in the Magoffin circuit court under an indictment charging him with the murder of S. B. Salyer, and his punishment fixed at confinement in the penitentiary for a term of five years. He complains upon this appeal that a number of errors prejudicial to his substantial rights occurred upon the trial, and for which he asks a reversal.

First it is insisted that the indictment under which he was tried and convicted is fatally defective, in that it fails to allege that the killing of Salyer was feloniously committed, and in support of this contention refers us to *Kaelin v. Com.*, 84 Ky., 354 (8' R., 293) 1 S. W., 594. It was held in that case that the lower court erred in overruling the demurrer filed by the defendant to the indictment. But in this case the sufficiency of the indictment was not called in question in the lower court by the defendant in any way; but, on the contrary, the jury were instructed on the theory that the offense was feloniously committed. We think it is too late, after the case has been tried out in the lower court, for a defendant to raise this question for the first time in this court.

Appellant next complains that the trial court erred in overruling his motion for a continuance. The affidavit filed in support of this motion fails to state that the witnesses whose testimony defendant desired to avail himself of were not absent by his consent or procurement, or where they were at that time, or what grounds existed for the expectation that their testimony might be procured if the case was continued. Besides, the alleged facts which he recites he would prove by these absent witnesses would not have been competent if they had been present.

The next and most important ground relied on is that

the court erred in permitting Mrs. Jane Salyer, the widow of the deceased, to prove an alleged dying declaration which was made to her a short time previous to his death by her husband. It is insisted that this testimony was incompetent, both because it did not sufficiently appear that the dying declarations were made under a sense of impending death, and for the additional reason that under section 606 of the Civil Code "the wife was incompetent to testify even after the cessation of the marriage relation, to any communication made to her by her husband during marriage." The facts relied on to show the admissibility of the dying declaration, as testified to by the witness, are that her husband said to her several times after he was wounded that he could not get well, did not expect to live; and that he made the declaration offered in evidence on the day he died; that he said in the same conversation that his time was short; that perhaps it was best; that previous to making the declaration he had been gradually sinking for several days. To render the statements of a person admissible as dying declarations, such person need not in express words declare that he is about to die, or make use of equivalent language. The essential preliminary fact to be proven to render it competent is that they were made under a consciousness of impending death; and this may be determined not only by what he declares on the subject, but also by his evident danger and surrounding circumstances. The testimony on this point leaves no room to doubt that the deceased realized that he was about to die, and, in our opinion, there was sufficient foundation for the dying declaration. See *People v. Com.*, 87 Ky., 487 (10 R., 517) (9 S. W., 509, 810); *Com. v. Matthews*, 89 Ky., 287 (11 R., 505) 12 S. W., 333. In the case of *Com. v. Minor*, 89 Ky., 555, 11 R., 775, 13 S. W., 5 this court had before it a question which in-

volved subsection 8 of section 606 of the Civil Code, which provides: "No prisoner in the penitentiary of this State, or of any other country, shall testify, nor shall any person testify for himself against such prisoner." And it was held that a convict in the penitentiary was competent to testify as a witness in a criminal proceeding unless he had been convicted of some one of the offenses referred to in article 8 of chapter 29 of the General Statutes. The court said: "It seems to us that the section can not be made applicable to criminal procedure, for the two Codes are wholly and necessarily distinct, and in every instance where it seems to have intended a section in one of them should be treated as a part of both it has been so expressly provided. Moreover, the language of and reason for that section shows it was intended to apply to the testimony of, nor of others against, convicts in criminal cases." And this case was referred to and approved in *Hilbert v. Com.* (21 R., 537) (51 S. W., 817), where the court said: "On grounds of public policy the wife can not testify against her husband as to what came to her from him confidentially or by reason of the marriage relation, but this rule does not apply to a dying communication made by the husband to the wife on the trial of the one who killed him. The declaration of the deceased made *in extremis* in such cases is a thing to be proven, and this proof may be made by any competent witness who heard the statement. The wife may testify for the State in cases of this character as to any other fact known to her." Greenleaf on Evidence (section 337), in stating the reason for the rule at common law, says: "The great object of the rule is to secure domestic happiness by placing the protecting seal of the law upon all confidential communications between husband and wife, and whatever has come to the knowledge of either by means of the hal-

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lowed confidence which that relation inspires can not be afterwards divulged in testimony, even though the other be no longer living." But in section 342 the same author says: "But, though the husband and wife are not admissible as witnesses against each other where either is directly interested in the event of the proceeding, whether civil or criminal, yet in collateral proceedings not immediately affecting their mutual interest, either evidence is receivable." The same rule is announced in Whart. Cr. Ev. (3d Ed.), section 427. It can not be contended that the dying declaration testified to by the witness was a confidential communication made to her; on the contrary, it was evidently made in the furtherance of justice for the express purpose that it should be testified to in the prosecution of the defendant. The rule announced in *Scott v. Com.*, 94 Ky., 511 (15 R., 251) 23 S. W., 219, 42 Am. St. Rep., 371, is not in conflict with this view of the law. In that case the husband was on trial for murder, and the court held a letter written by him to his wife while he was confined in jail to be a confidential communication, and therefore not competent evidence against him. We are therefore of the opinion that it was competent for the wife of the deceased to prove the dying declaration.

The instructions fairly submit the law, and upon the whole we see no error in the record. The judgments must, therefore, be affirmed.

Whole court sitting.

Jones v. Commonwealth.

CASE 66—HIRAM JONES WAS INDICTED FOR MURDER AND FROM AN ORDER "FILING AWAY" THE INDICTMENT HE APPEALS.—JAN. 28.

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Jones v. Commonwealth.

APPEAL FROM BELL CIRCUIT COURT.

FROM AN ORDER "FILING AWAY" AN INDICTMENT, DEFENDANT APPEALS. REVERSED.

CRIMINAL LAW—SPEEDY TRIAL—BILL OF RIGHTS—FILING AWAY INDICTMENT—FINAL ORDER—APPEAL.

- Held: 1. Bill of Rights, section 11, provides that in prosecutions by indictment or information accused shall have a speedy trial. Accused was indicted and appeared, and the case was set for trial, and afterwards continued by consent till the next term, accused being released on bail. On being then called for trial, the Commonwealth's attorney announced that he was not ready, and moved the court to discharge the witnesses, and accused from his bond, and to file the indictment away, with the right to reinstate it on the Commonwealth's motion. The motion was sustained over accused's objection and insistence on a trial or dismissal. **HELD**, error as the practice of filing away indictments is not to be indulged where the accused has been served with process, and objects to the order.
2. An order "filing away" an indictment, to be reinstated on the docket on the Commonwealth's motion, is sufficiently final to be appealable.

SMITH & INGRAM, FOR APPELLANT.

The appellant was indicted in the Bell circuit court for murder. When the case was called for trial the Commonwealth's attorney refused to go into trial and moved the court to file away this case (and another for wrecking a train) with leave to redocket on his motion, which motion was sustained by the court over the objection of the defendant, from which order defendant appeals.

We contend that such practice in criminal cases is contrary to section 11 of the Constitution, wherein a defendant is guaranteed "a speedy and public trial."

No notice is required to be given to the defendant of said motion, and the defendant is not given the right to have the case redocketed, but he must remain in court for years, sub-

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ject to be called upon at any time to make his defense, but can not have a trial without the consent of the Commonwealth's attorney.

There may be some question as to whether the order is such a one as can be appealed from. We think the motion was in substance a motion to dismiss the indictments and that the effect of the order is to do so, and that so much of the order authorizing the attorney for the Commonwealth to have the case redocketed is illegal, and we ask the court to reverse the judgment with directions to the lower court to enter an order dismissing the indictments, or to set aside the order and grant defendant a "speedy trial."

CLIFTON J. PRATT, ATTORNEY GENERAL, AND M. R. TODD, FOR THE COMMONWEALTH.

We insist that the order of the lower court filing the indictments away and dismissing the defendant and witnesses is not and can not be, under the practice and in this State, subject to an exception or consideration for review in this State. *Kennedy v. Com.*, 14 Bush, 340; *Criminal Code*, secs. 280, 335; *Terrell v. Com.*, 13 Bush, 246.

OPINION OF THE COURT BY JUDGE SETTLE—REVERSING.

The appellant, Hiram Jones, was indicted by the grand jury of Bell county for the murder of one James Shumate, resulting, as alleged, from the willful, wanton, and malicious act of the appellant in placing obstructions on the railroad track, whereby an engine and cars of which Shumate had charge as engineer were derailed and wrecked, and he crushed and wounded to such an extent that he at once died. The indictment was returned and filed in the Bell circuit court October 18, 1901. On the same day appellant appeared in court, and the case was, by order of the court, set for trial on the seventeenth day of the term in progress. Thereafter (and presumably on the seventeenth day) a continuance of the case was granted the appellant, and by consent of parties it was set for trial on the thirteenth day of the succeeding May term. The appellant was thereupon allowed bail in the sum of \$2,000. On the sixteenth day

of the May term, 1902, the cause was called for trial, and appellant being again in court, answered that he was ready for trial; but the Commonwealth's attorney announced that the prosecution was not ready for trial, and moved the court to discharge the witnesses, and the appellant from his bond, and to file the indictment away, with the right to reinstate it on motion of the Commonwealth, to which motion appellant objected, and insisted that the case be dismissed, or that he be granted a trial; but, notwithstanding his objection, the motion of the Commonwealth's attorney was sustained, and the indictment, by order of the court, was filed away, with leave to redocket upon motion of the Commonwealth's attorney. To the order thus disposing of the indictment, and to the refusal of the court to grant him a trial, appellant excepted at the time, and prayed an appeal to this court, which was granted.

The practice of filing away indictments, though never authorized by legislative enactment, has long obtained in this State. It either came to us as a part of the common law, or was devised by some one or more of the pioneer jurists of our Commonwealth, to whose wisdom we are indebted for much that is good in our present system of jurisprudence. At any rate, the long continuance of the practice, and its convenience as well, admonish us that it would be unwise to abrogate it altogether. We think it the better policy, therefore, in determining whether this practice should have been followed in the case before us, to lay down some general rules which will indicate to the circuit courts the limitations that should be observed in the future attempts to follow it. This court has in two instances decided that the filing away of an indictment with leave to reinstate did not operate as a dismissal thereof, but only as a discontinuance of the case for the time being. The

first case in which the court so held was that of *Ashlock v. Com.*, 7 B. Mon., 44. Ashlock was indicted in the Fayette circuit court for maintaining a faro bank. At the next term of the court, no process having been served on the defendant, the following order was entered in the case: "On motion of the Commonwealth's attorney, it is ordered that this case be stricken from the docket, with leave to reinstate it hereafter by motion." Subsequently process issued upon the indictment, and was served upon the defendant, and at the succeeding term of the court the case, on motion of the attorney for the Commonwealth, was reinstated upon the docket, after which there was a trial, resulting in the conviction of the defendant. In considering the exception taken to the orders of the circuit court filing away and redocketing the case, this court said: "An order striking a suit from the docket, made on motion of the plaintiff, and without reservation or qualification, we should be inclined to regard as a voluntary dismissal or discontinuance, and as placing the case, after the term when the order was made, beyond the power of the court. But here the right to reinstate the case on the docket being expressly reserved, the order, we think, should not be construed as a dismissal or discontinuance, but as a mere removal or omission of the case upon the docket. If right in this construction of the order, the case was still in court, and the issuing and service of process before it was replaced on the docket was not unauthorized or invalid. The order is, however, in our opinion, unusual, and we would not be understood as approving such a rule of practice, perceiving no necessity nor sufficient reason for it, and it may have the effect to delude and entrap litigants." The second case that came before this court in which the practice of filing away indictments was called in question was that of *Com. v. Bottoms*, 105

Ky., 222 (20 R., 1159) 48 S. W., 974, and involved a construction of an order entered in the Adair circuit court, whereby eight several indictments pending in that court against one Joe Bottoms for the unlawful selling of spirituous liquors were filed away, with leave to reinstate without notice, with the consent and upon the promise of Bottoms that he would not again sell such liquors. But later Bottoms was again indicted, tried, and convicted for a similar offense, and thereafter the eight indictments were, by direction of the Commonwealth's attorney, redocketed by the clerk of the court, and process issued thereon against Bottoms, who appeared in court, and filed a written motion to strike the indictments from the docket, which motion was sustained by the court. In reversing the judgment of the lower court in thus disposing of the indictments, this court said: "Where the defendant is before the court, and the case stands for trial, we are not aware of any rule of practice that would authorize the attorney for the Commonwealth on his own motion to file the indictment away on conditions, and hold the prosecution *in terrorem* over the defendant, and we do not approve of such practice. However, such was done in this case, and with the consent of the appellee, and upon terms; and it being shown that the terms had been violated by the appellee, he should not complain if the attorney for the Commonwealth prosecutes the indictments to trial, as the agreed order recites he may do; nor is there anything in the order itself, or its effect, that forbids such action by the Commonwealth. The legal effect of such an order was simply a continuance indefinitely, and an exoneration of any bail for appearance, unless the contrary should appear in the order; and, upon reasonable notice being given to the accused, the case might stand for trial at any term of court.

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We think this might be done without showing a violation of the promise to abstain from further violations." The facts of the case before us are in many respects unlike those of the two cases mentioned. In the first case the accused, Ashlock, had not been served with process, and was not in court when the order taking the indictments from the docket with leave to reinstate was entered. In the second, Bottoms was in court in obedience to its process when the order was taken and gave his consent thereto; but in this case the appellant, Jones, was under bond for his appearance, and upon the calling of the case for trial he was present with his witnesses, and demanded a trial, which was refused, and the indictment, over his objection and protest, was stricken from the docket, with leave to the Commonwealth's attorney to have it reinstated at his will. We regard this action of the lower court as an abuse of the rule of practice in question, and we do not hesitate to declare that an indictment should never be so disposed of when the accused, being present, objects thereto, and in good faith demands a trial. The Constitution of our State provides that "in all criminal prosecutions the accused has the right to be heard by himself and counsel, to demand the nature and cause of the accusation against him, to meet the witnesses face to face, and to have compulsory process for obtaining witnesses in his favor;" "and in prosecutions by indictment or information he shall have a speedy trial by an impartial jury of the vicinage." Const. (Bill of Rights), section 11. These guaranties are for the protection of the citizen, and no rule of practice, however ancient or sacred, should deprive him of them. We do not hold that in no case should the "filing away" of an indictment be allowed, for it is permissible when done before the arrest of the defendant, or before service of process upon him, and

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it should certainly be allowed where the defendant is present in court and consents, or fails to object, thereto.

It is contended for the Commonwealth that the order appealed from is not final, and, if so, that the appeal should be dismissed. In a sense the order does not appear to be final, for it does not prevent the Commonwealth's attorney from redocketing the case and renewing the prosecution at any time, but in a much more important sense, and as it affects the appellant, the order must, we think, be treated as final for the purposes of an appeal, for while it stands he is powerless to secure a trial, however innocent he may be, yet all the while resting under a grave charge affecting his reputation and endangering his life or liberty. What remedy has he if refused the right of appeal? If he were to move the lower court to redocket the case and dismiss the indictment, the order of that court overruling the motion would be no more final than the one appealed from. Neither mandamus nor injunction will lie to control a court in the exercise of its judicial discretion, and the writ of prohibition can only be employed to prevent an inferior court of limited jurisdiction from proceeding in a matter out of its jurisdiction. We are of the opinion, therefore, that the court has the jurisdiction to entertain the appeal, and that to hold otherwise would amount to a denial of justice.

The judgment or order appealed from is reversed, and the cause remanded, with directions to the lower court to set it aside, and to redocket the case, that the appellant may have as speedy a trial as will be consistent with the ends of justice.

Scott and Others v. Pendley.

CASE 67—ACTION BY NOVELLA PENDLEY AGAINST GEORGE P. SCOTT AND OTHERS TO RESTRAIN SAID SCOTT FROM TEACHING A DISTRICT SCHOOL AND FROM PREVENTING PLAINTIFF'S USE OF THE SCHOOLHOUSE.—JAN. 28.

Scott and Others v. Pendley.

APPEAL FROM BUTLER CIRCUIT COURT.

JUDGMENT FOR PLAINTIFF AND DEFENDANTS APPEAL. REVERSED.

SCHOOL DISTRICTS—TRUSTEES—ACTS OF BOARD—EMPLOYMENT OF TEACHER—NOTICE OF MEETING.

Held: Under Kentucky Statutes, section 4445, providing that "the trustees in their corporate capacity at a meeting, called for that purpose, shall employ a qualified teacher and agree with him as to compensation," a contract employing a teacher executed by two of the three trustees at a meeting in the county jail where one of them was confined, of which meeting the third trustee had no notice, is void.

2. It is necessary that a contract, to be binding on the district, should be executed at a board meeting at which all three of the trustees are present, and no meeting can be held unless all are present, or unless the absent member has had notice, provided the absent member is in the county and with reasonable effort and diligence the notice could have been served on him.
3. The fact that the absent trustee had expressed himself in opposition to employing the person contracted with, did not render a notice to him of the meeting unnecessary.

FOR T. HOWARD, W. R. GARDNER AND J. W. HARRELD, FOR APPELLANT.

On July 1, 1901, Miss Pendley, appellee herein, a qualified teacher, applied for the school in District No. 71, in Butler county. The trustees were Blancett, Baxter and Doolin. Doolin, in company with some friends of appellee, went to the county jail where Blanchett was confined and got a contract signed by Blancett and Doolin for appellee to teach said school for the school year ending June 30, 1902. Baxter, the third trustee was not present and had no notice of the meeting.

In a few days thereafter, Blancett resigned as trustee and Galloway was appointed in his stead.

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On July 5, a meeting was held at the school house in said district to employ a teacher of which all the trustees had notice, at which the trustees ignored the attempted contract made with appellee, and employed appellant, George Scott to teach the school and placed him in possession of the school house. After the school was in progress, appellee obtained a mandatory injunction compelling Scott to vacate the house and preventing him or the trustees from interfering in any way with appellee in teaching the school. On the trial of the action judgment was rendered adjudging that appellee was entitled to teach the school and perpetuating the injunction from which judgment this appeal is prosecuted.

Our contention is, that the trustees of a school district are a body corporate and can make contracts only in such capacity; that each should have notice of the time, place and purpose of the meeting, and that no two can act without notice to the other of the time and place of meeting, and that a contract is not binding except made at a meeting called and held in this way. *School District v. Bennett* (Arkansas); *Kentucky Statutes*, sec. 4445; *State v. Johnson*, 26 Ark., 281; *Alkman v. School District*, 27 Kan., 129; *Hazen v. Serche*, 47 Mich., 626; *School District v. Jennings*, 10 Ill. Ap., 643; *Ballard v. Davis*, 31 Miss., 533; *Downing v. Rugor*, 21 Wend., 178.

GUFFY & WHALIN AND TAYLOR & BORCH, FOR APPELLEE.

The contract of appellee was signed by two of the trustees, Blanchett and Doolin, July 1, 1901, and this fact was known to appellant Scott and to all three of the trustees in office at the time he claims to have been employed on July 5.

Scott contends that appellee's contract is not binding because not made at a meeting held by the trustees for that purpose.

We contend that Baxter had notified appellee that he would consent to employ her, and it was therefore not necessary to notify him of the meeting when the other two trustees had agreed to employ appellee. 13 Neb., 68; 98 Post., 444; 70 Post., 229; 22 Rep., 390; 22 Rep., 95.

OPINION OF THE COURT BY JUDGE NUNN—REVERSING.

On the 1st day of July, 1901, Thomas Baxter, G. W. Doolin, and W. T. Blanchett were the trustees of school district No. 71 in Butler county, Ky., and on that day, in the county jail, where Blanchett was confined on the charge of felony, the said Blanchett and Doolin made and execut-

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ed a written contract with appellee, Pendley, to teach the school for that district for that school year. It is agreed that no call was made for this meeting held in the jail, nor did Baxter, the other trustee, have any notice of same. On the 3d day of July, Blanchett resigned as trustee, and one Galloway was appointed and qualified. On the 5th of said month, and after notice had been served on Doolin, the other trustee, a meeting was called for the purpose of employing a teacher; and at said meeting (Doolin not attending) Baxter and Galloway entered into a written contract with appellant Scott to teach the school. Both appellant and appellee had notice of the contract of each other. On the 25th of July thereafter, appellant Scott commenced to teach the school; and appellee filed this action, setting forth her contract, and obtained a temporary restraining order against appellant and trustees Baxter and Galloway, prohibiting Scott from teaching the school, and the trustees from preventing her the use of the school-house, and the appellee entered and taught the school. The only question necessary for the court to determine is, was the appellee entitled to teach the school, under her contract?

The Kentucky Statutes (section 4445), in so far as applicable, reads as follows: "The trustees, in their corporate capacity, at a meeting called for that purpose, shall employ a qualified teacher, agree with him as to compensation, etc. We have not been cited to, nor have we been able to find, any decisions of the court of appeals of Kentucky construing this part of said statutes. We have been referred to an opinion of the supreme court of Arkansas *School District v. Bennett*, 52 Ark., 511, 13 S. W., 132, in which case the same question was involved. In that case this language is used: "It is necessary that a contract, to be binding on the district, should be executed at a

board meeting at which all the directors are present, or at which the one absent had notice. We appreciate the practical importance of this question, but entertain no doubt as to its proper solution, either on reason or authority. The different members of a board, scattered in the pursuit of their several avocations, are not the board. Duties are cast upon boards composed of a number of persons, in order that they may be discharged with efficiency and wisdom arising from a multitude of counsel. This purpose can not be realized without reference to the matters intrusted to them before they take action thereon. After conference the board will often escape unwise measures, to which each of the members, acting separately, would have committed themselves, either from haste, immature discretion, or an unwillingness to shorten the allotted span of life under the entreaties of an importunate agent or teacher. The public selects each member of the board, and is entitled to his services. This it can not enjoy if two members can bind it without receiving or even suffering the counsel of the other. Two could, if they differed with the third, overrule his judgment and act without regarding it; but he might by his knowledge and reason change the bent of their minds, and the opportunity must be given him. We conclude that two directors may bind the district by a contract made at a meeting at which the third was present, or of which he had notice, but no contract can be made except at a meeting, and no meeting can be held unless all are present, or unless the absent member had notice. We do not decide that the members of a board may not act separately and without meeting in a manner which involves no exercise of discretion." This court is of opinion that this part of the above quotation,

"No meeting can be held unless all are present or unless the absent member had notice," should be qualified by adding thereto these words, "provided the absent member is in the county, and with reasonable effort and diligence the notice could have been served on him." It is the opinion of this court that the contract of appellee with Doolin and Blanchett was made contrary to the statute, and that she had no right to teach the school thereunder.

It is stated that Baxter had previously expressed himself in opposition to contracting with appellee, and Doolin with appellant, and Blanchett had promised both; and appellee claims for this reason that notice to Baxter was unnecessary and useless. If these statements be true, it more clearly shows the necessity of bringing the board together, or at least giving all an opportunity of coming together and exchanging reasons and arguments before entering into a contract with a teacher. Certainly Baxter should have had an opportunity, if he desired, in connection with Doolin, to reason with and try to convince Blanchett that the contract with appellee should not have been entered into.

For these reasons, the judgment of the lower court is reversed, and cause remanded, with directions to dismiss appellee's petition.

Judge Settle not sitting.

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CASE 68—ACTION BY J. W. WALLS AGAINST THE HOME INSURANCE COMPANY OF NEW YORK TO RECOVER LOSS ON A POLICY OF FIRE INSURANCE.—JAN. 28.

Walls v. Home Insurance Co. of New York.

APPEAL FROM CLAY COUNTY.

JUDGMENT FOR DEFENDANT AND PLAINTIFF APPEALS. REVERSED.

Held: 1. Plaintiff effected insurance on his property for a term of years, the premiums to be paid annually. He paid the premium for the first year, and gave a note for the deferred premiums, the note and policy providing that, if any installment was not paid when due, the company should not be liable for loss during such default, and the policy should lapse until payment should be made. The first installment, due in June, was not paid, and the company sent the note to its nearest agent to collect. During the next six months the agent sent plaintiff three notices, each demanding payment of the full amount of the installment, and in January returned the note to the company as uncollectible. On March 19th plaintiff mailed a check for the full amount of the installment, which was never received. On March 23d the property was burned. HELD, that the company, by demanding payment of the full amount of the installment long after it was due, waived the conditions providing for lapse of the policy during default, and thereby continued the policy in force.

2. The check was not received or accepted as payment, or pleaded as such, and was never paid, and plaintiff did not at that time or thereafter have sufficient funds in the bank on which it was drawn to have paid the check. HELD, that the mailing of the check was not payment of the installment due, but in an action to recover under the policy, evidence of the mailing of the check was relevant as tending to show that plaintiff had not abandoned his contract, and that he considered himself bound thereon.

JOHN W. LEWIS, ATTORNEY FOR APPELLANT.

CLASSIFICATION OF QUESTIONS DISCUSSED AND AUTHORITIES CITED.

1. An insurance company retaining the overdue installment note for premium and insisting upon and demanding payment of same with notice to insured that if not paid same would

114	611
120	774
114	611
129	632

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be put out for collection or be sued on, waives its rights to forfeit the policy or to consider it as lapsed and it remains in force. *Moreland v. Union Central Life Ins. Co.*, 20 Ky. Law Rep., 434; *Joyce on Insurance*, secs. 1372 and 1379; *Montgomery v. Phoenix, & Co.*, 14 Bush, 71; *Home Insurance Co. v. Karns*, 19 Ky. Law Rep., 276, 277; *Phoenix Ins. Co. v. Speans & Thomas*, 87 Ky., 297; *Moore v. Continental Ins. Co.*, 21 Ky. Law Rep., 977.

2. A check may be made absolute payment by agreement and is payment when not dishonored. *National Park Bank v. Levy Brothers*, Sup. Ct. Rhode Island, 19 Lawyer's Reports Annotated, 477; *Morse on Banks and Banking*, 3d edition, secs. 543, 545; *Cromwell v. Lovett*, 1 Hall, 64; *Smith v. Jones*, 1 Bush, 106; *Lester & Co. v. Given, Jones & Co.*, 8 Bush, 359.

3. The demand for payment of overdue installment of premium note being unconditional and nothing being said about short rates or as to any payment to be made in order to revive or continue in force the policy, same is continued in force. *Moreland v. Union Central Life Ins. Co.*, 20 Ky. Law Rep., 432; *Moore v. Continental Ins. Co.*, 21 Ky. Law Rep., 977.

W. C. McCHORD, FOR APPELLEE.

CLASSIFICATION OF QUESTIONS DISCUSSED AND AUTHORITIES CITED.

1. A contract of insurance by the terms of which the insurance ceases on default of the payment of an installment of the premium at maturity, is not against public policy, and is enforceable, and a loss occurring during the time of such default can not be recovered, notwithstanding the insurer may have demanded that the insured comply with his contract to pay such insurance before the loss. *Home Ins. Co. New York v. Karns*, 19 Ky. Law Rep., 273; *Holly v. Metropolitan Life Ins. Co.*, 105 N. Y., p. 437; *Bosworth v. Western Mutual Aid Society*, 75 Ia., 582; *Ashbrook v. Phoenix Mutual Life Ins. Co.*, 94 Mo., 72; *Robinson v. Continental Ins. Co. (Mich.)* Lawyer's Report Annotated, vol. 6, p. 95; *Fowler v. Metropolitan Life Ins. Co. New York*, Lawyer's Report Annotated, vol. 5, p. 805.

2. Where a policy of insurance against loss by fire is issued on the installment plan, and the policy and notes given for the installment, provide that on default in payment of any installment due on the installment note, all of said installments shall be deemed earned as premiums, and are collectible by law; a demand of the payment of past due installment does not constitute an extension of time of payment, nor waive the forfeit-

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ture provided for in the policy. *Moreland v. Union Central Life Ins. Co.*, 20 Ky. Law Rep., p. 432.

3. Parties to an insurance contract have the right to insert therein such lawful conditions as may be agreed upon, or which may be considered necessary and proper to protect their interest, and which, when made, must be construed and enforced according to the expressed intent of the parties. *Dwight v. German Ins. Co.*, 103 New York, p. 341.

4. It is not lawful, or against public policy, for a contract of insurance to stipulate that upon certain conditions, or contingencies, the policy shall be void. *Northwestern Mutual Life Ins. Co. v. Hazlett*, 105 Ind., p. 212.

5. If there is any one thing more than another which public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into fairly and voluntarily shall be held sacred and shall be enforced by courts of justice. Therefore, we have this paramount public policy to consider and that you are not lightly to interfere with the freedom of contracts. 175 U. S. Lawyer's Edition, p. 91.

6. The appellant, who prosecutes an appeal upon an impartial transcript, does so at his peril, and if it appears that part of the testimony used on the trial in the court below, is not copied in the transcript, it will be presumed in support of the judgment that it will sustain the averments of appellee's pleadings. *Jones v. Jackson*, 13 Ky. Law Rep., p. 253; *McKee v. Stein*, 91 Ky., p. 240.

OPINION OF THE COURT BY JUDGE O'REAR—REVERSING.

Appellant, Walls, effected a contract of insurance upon his dwelling house and contents with appellee insurance company for a term of years upon the plan of paying the premiums in annual installments. The first premium was paid in advance for the first year's insurance. Appellant, when taking the insurance, executed to appellee a note for \$30 for the aggregate of the four remaining years of the term. An equal part, to-wit, \$7.50, was to be paid the 1st day of June of each year, and in advance for the insurance for that year. The note contained this additional stipulation: "And it is hereby agreed that, in case any one of the installments herein named shall not be

paid at maturity, or if any single payment promissory note (acknowledged as cash or otherwise) given for the whole or any portion of the premium for said policy shall not be paid promptly when due, this company shall not be liable for loss during such default, and the said policy shall lapse until payment is made to this company at the Western Farm Department at Chicago; and, in the event of nonsettlement for time expired as per terms on short rates, the whole amount of installments or notes remaining unpaid on said policy may be declared earned, due, and payable, and may be collected by law." The policy contained an expression of the same idea, and other conditions relating thereto in this language: "But it is expressly agreed that this company shall not be liable for any loss or damage that may occur to the property herein mentioned while any installment of the installment note given for the premium upon this policy, remains past due and unpaid, or while any single payment promissory note (acknowledged as cash or otherwise) given for the whole or any portion of the premium remains past due and unpaid. Payments of notes and installments thereof must be made to the said Home Insurance Company at its Western Farm Department office in Chicago, Illinois, or to a person or persons especially authorized to collect the same for said company. . . . The company may collect, by suit or otherwise, any past-due notes or installments thereof, and a receipt from the said Chicago office of the company for the payment of the past-due notes or installments must be received by the assured before there can be a revival of the policy, such revival to begin from the time of such payment. . . . This company reserves the right to cancel this policy or any part thereof by tendering to the assured the unearned pro rata premium, after due notice to that

effect, either by mail addressed to the assured at his, her or their post-office address as named in this policy or otherwise. The assured may also cancel when the premium or note or obligation given for such premium has been actually and fully paid in cash, in which case the company shall retain the expenses of writing, procuring and taking the risk, and the usual short rates from the date of the policy up to the time it is received for such cancellation." There is contained in the policy this further expression: "This contract being based upon the mutual good faith of the parties hereto, it is agreed," etc. The installment due June, 1900, was not paid. Appellee retained the note. Appellant retained the policy. Appellee wrote appellant to pay the installment after it was due and default had been made. In the following July appellee had sent the note to its agent at Springfield, near appellant's post-office address, with instructions to collect the note. The agent sent appellant three notices. The agent's evidence on this point is as follows: "Q. Did you notify Mr. Walls? A. I sent him three notices. Q. What was the substance of them? A. That his installment due on the 1st of June, 1900, was in arrears, and that, if he would send me the money, I would have the company send him a receipt. That is about the way I send the first two notices usually. I always use about the same form. I don't remember the words exactly. In the last notice I sent him—in January, I reckon—I notice that I turned the note back to the company about the latter part of January. I have the receipt for the note. I wrote them that I could not collect it—I told him that he would have to pay it, or I would send it in to the company, and let them put it out for collection." Appellant failed to respond to these notices until March 19, 1901, when he mailed to appellee's

agent at Springfield a check on the Peoples' Deposit Bank of Springfield for \$7.50. It seems to be pretty clearly established that this check was mailed at appellant's post-office, but that it was not received by the agent. Certain it is that it was not presented to the bank nor paid. On March 23, 1901, the insured house was destroyed by fire, and the contents destroyed, or badly damaged. Upon this state of facts the court, at the conclusion of the evidence, ordered a verdict for appellee.

The correctness of these instructions depends upon whether appellee had waived the conditions of its policy and of the note that the policy should lapse, and the company not be liable for loss, during default in the payment of the premium. It will be observed that the insurance company not only retained the note executed by appellant for the premium after it was due, but that it unconditionally requested the payment in full of that part of the note which represented the whole premium for the year beginning June 1, 1900. Nothing was said at the time concerning the company's claim that the policy was lapsed, or that the company's liability thereon was suspended during such time as the premium was unpaid. Nor was there coupled with the demand any statement by the company limiting its liability to future insurance, and denying its liability for the time intervening since the default in the payment of premium. In *Moreland v. Insurance Co.*, 104 Ky., 129 (20 R., 432) (46 S. W., 516), there had been default in the payment of the insurance premium past due, evidenced by the note of the assured, the policy containing a provision that the failure to pay any of the first three installments, or notes, or interest upon the notes given for any of said premiums on or before the days on which they became due, should void and nullify the policy with-

out action on the part of the company. The company in that case retained the premium note after its maturity, and made an unconditional demand for its payment, and indeed, placed it in the hands of its attorney for collection. The court formulated these two questions in that case as the propositions between which the law must make choice in giving construction and effect to such act on the part of the insurance company, namely: "The question is, can the company insist on payment of the note, and at the same time consistently say that the policy, having been forfeited by its nonpayment, remains forfeited? Or will not the real intention of the parties be effected by holding that, although the policy was forfeited by this nonpayment, yet, as the retention of the note and demand for its payment after maturity are acts inconsistent with an intention to insist on a continued forfeiture, therefore the forfeiture is to be deemed waived?" The court chose the latter, not being able to find satisfactory legal principle upon which the company might "insist on the one hand on the insured complying with his part of the contract, and on the other insist that the contract is a dead one." The court held, too, that all the insured was required to do after the default in premium under such condition, if it did not wish to continue its liability under the policy, was to so act that its conduct would not be inconsistent with the claim of nonliability. Counsel for appellee here puts the question: Can not these parties make such contract as is suitable to themselves, and may it not be enforced according to its terms? Their right to contract is not limited in respect to the terms of the insurance. While parties may contract with reference to insurance, they may also waive conditions of their contract. The question here presented is: Has the insurer waived that condition of its contract

of insurance providing for lapsing of the policy upon default in payment of the premium? That the insurer could not be compelled to carry this liability under the contract without payment in advance is not to be doubted. On the other hand, if it saw proper to carry the liability without the payment of the premium in advance it could do so. Here the premium had been in default from June until January following, when the company was insisting upon the payment of the whole of the premium for the current year. Nothing would be owing the company for the time from June 1, 1900, until the dates of the respective demands for the payment of the premium thereafter, if, as a matter of fact, the policy had lapsed, and the company was not bound thereon, because, manifestly, if the company was not bound for the loss in case of fire, the insured was not bound for the payment of the premium during such time. On the other hand, if the insured was bound for the payment of the premium, and was so treated by the company, and acceded to by the insured, then it must follow that the company was bound upon its policy; for that, and that alone, could uphold as a consideration the promise and obligation of the insured to pay the premium. As said in the *Moreland* case, *supra*, the action of the company in demanding unconditionally the payment of the note was an act inconsistent with the idea that the policy had lapsed, and that it was not bound thereon. The same principle was approved and applied by this court in *Moore v. Insurance Co.*, 107 Ky., 273 (21 R., 977) (53 S. W., 652). We are of opinion that the conduct of appellee amounted to a waiver of the conditions of the policy providing for the suspension of its liability after default in the payment of the premium until the premium should be paid.

It is claimed by appellant that the mailing of the \$7.50

check heretofore referred to was in law a payment of the premium due June 1, 1900. It was shown by the testimony of appellant and by the postmaster at whose office the letter was mailed that the check was filled out and signed and placed in an envelope, properly addressed, and that it was placed in the mail pouch. It is claimed that after the necessary time had elapsed for it to have reached the addressee in due course its receipt and acceptance will be presumed, and it will be adjudged that the facts stated constituted a payment. This contention can not be sustained in this case for the following reasons: (1) It was not pleaded that the premium had been paid; (2) It was not shown that appellee's agent received or accepted the check in payment; (3) the check was not in fact paid, nor presented to the bank upon which it was drawn; nor (4) did appellant have at the time, or any time thereafter before the fire, enough funds in the bank to his credit to have paid the check. However, the fact that appellant sent the check under the circumstances stated by him was relevant as tending to show that he had not abandoned his contract, and that he considered himself bound thereon.

But for the reasons indicated, the judgment must be reversed, and the cause remanded for a new trial under proceedings not inconsistent herewith.

CASE 69—WILLIAM MCCARTY WAS CONVICTED OF MURDER AND APPEALS.
—JAN. 28

McCarty v. Commonwealth.

APPEAL FROM FAYETTE CIRCUIT COURT.

JUDGMENT FIXING DEATH PENALTY. AFFIRMED.

MURDER—INSANITY—INSTRUCTIONS—ARGUMENT OF COUNSEL—EXCEPTIONS.

Held: 1. On a trial for murder of defendant's wife there was evidence that on the previous evening, and on numerous occasions running back for several months, defendant had abused and beat her, because she did not give him money, and, as some witnesses testified, because she did not give him money to buy whisky; that he was without means, idle, and dissipated, and had done little or no work for several months, while she had worked as a domestic; and that he had frequently threatened to kill her. The court charged that such evidence was admitted solely for the purpose of showing the state of defendant's mind, if it did show it, and of his motives; and that the jury should not allow the same to influence their verdict in fixing the punishment, if they should from the other evidence find the defendant guilty. HELD, that such instruction was as favorable to defendant as he was entitled to.

2. Where a husband continued to live with his wife for weeks after having been told of her infidelity, his subsequent act of killing her could not be reasonably attributed to jealous frenzy aroused by a sudden and unexpected revelation of her infidelity.
3. If defendant's mind was "free from disease, then no impulse to shoot" the deceased, "no matter how violent, and no matter how completely it dominated his will, was unsoundness of mind," so as to excuse the homicide.
4. Where the bill of exceptions in a murder case does not show the remarks made by the attorney for the Commonwealth, or that any exceptions were taken thereto, the appellate court can not consider complaints thereof, based on what purports to be a newspaper report of a portion of the remarks.

W. G. DUNLAP, ATTORNEY FOR APPELLANT.

Our contention is:

1. That at the time of the killing appellant was so mentally

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exercised over the discovery of the infidelity of his wife as to be irresponsible for his acts.

2. At any rate, if guilty at all, he is only guilty of killing in sudden heat and passion and should not, under the evidence, have been found guilty of murder.

3. That the court erred in its instructions to the jury to the prejudice of appellant.

4. That the attorney for the Commonwealth in his closing argument to the jury made a vicious attack upon the character of appellant, where there was no testimony before the jury bearing upon it.

5. The defendant was a poor man of no influence and seems to have been offered up as a sacrifice to the public clamor that somebody ought to be hung.

W. P. KIMBALL, ATTORNEY FOR APPELLEE.

1. The evidence in this case showed that appellant had on previous occasions cruelly beat and maltreated his wife and had threatened to kill her, and we claim that these acts and threats were competent evidence for the consideration of the jury, especially as to whether the killing was a sudden impulse or premeditated.

2. There was no evidence before the jury showing any hereditary taint of insanity in defendant or his family, and nothing to support the appellant's claim of an "irresistible impulse to kill his wife, on the pretended discovery of her infidelity."

3. No objection was made to the language used by the Commonwealth attorney in his closing argument.

4. The instructions given by the court fairly and clearly present the law applicable to the case. 104 Ky., 496; 14 Bush, 398; 16 B. Mon., 587; Wharton's Crim. Law, 10 ed. vol. 1, p. 60, sec. 46; Moore v. Com., 92 Ky., 637.

OPINION OF THE COURT BY JUDGE O'REAR—AFFIRMING.

Appellant was tried, indicted, and convicted of the crime of willful murder, and sentenced to death. He was found guilty of having maliciously and feloniously killed his wife by shooting her in the back. His defense, and the only defense, was that of insanity. There is no evidence in the record of any taint from this malady in appellant's family, or in him previous or subsequent to the killing. No witness testified that, in his opinion, appellant was, or ever had

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been, insane. Appellant claimed that he had reason to believe that his wife had been unfaithful to him, and that at numerous times during several weeks and months prior to the killing information to that effect had come to him; that he had frequently discussed the matter with his wife. On the fatal occasion he claimed that he saw her at the home of a Mrs. Swigert, in the company of some unknown man, and that Mrs. Swigert's house had a bad reputation. As to these occurrences, including the killing, appellant testified as follows: "I thought I would go down and ask Mrs. Swigert where she was; and Bert Miller said: 'Come on. I ain't going to wait here all night for you;' and I went on, and as I got to the corner of the kitchen there, I commenced coughing, and I heard a noise at the other end of the little passway, and I looked up and saw Lucy [appellant's wife] and a man standing inside the gate between the houses; and they immediately commenced to run—the man first and Lucy second—but as they opened the gate I saw the plain figure of a man; but Lucy got between us, and I did not see where he went. But when I thought of the past, and all that had been told me, these things all came up before me, and I felt— Well, I do not know how I did feel—to think of all these things that had been told me, and to think that they were true. And I opened the gate, and I heard Mrs. Swigert say, 'Run, my God, run!' and Lucy run in the front door into the front room, and was in the act of going through the middle door, and I shot her twice, and run out right quick to see if I could find the man that was with her. I went around the house to see if I could catch him or not, but I could not see anything of Bert Miller, or the man, or anybody else. But when I came to myself, and thought about what I had done, I thought I had better see my mother. I thought I had

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letter see her first myself, and tell her what had happened, and I thought I would then give myself up." Instead of giving himself up, appellant hid himself under a house in the neighborhood, where he was found and arrested by the officers. That quoted above is the only evidence that in any way tends to establish appellant's claim of his being of unsound mind at the time of the killing, if it does. The only other witness to the transaction, except Mrs. Swigert, is Bert Miller. He testified that appellant was drinking, and was somewhat under the influence of whisky; that the killing occurred at 7 o'clock in the evening, after dusk. The witness and appellant were together, hunting for Mrs. Lucy McCarty, the deceased. As to what occurred just before and at the time of the killing, this witness said: "We got about fifteen feet away from the gate--somewhere along about that distance--and saw his wife standing there talking to a woman. Q. Where? A. At a lattice gate. Q.. Between the two houses? A. Yes, sir. . . . Q. Who did you see? A. This woman and his wife. Q. Which woman? A. I do not know who she was. Q. Saw Mrs. Swigert and a woman? A. Not Mrs. Swigert; Mrs. McCarty. Q. What took place then? A. He broke and run towards her. Q. Run in what direction? A Toward Main street. When he run, she slammed it to, and he jerked it open, and followed her into the front door. Q. Did you follow them? A. Yes, sir; I got as far as the front porch; and as she run, he run right behind her, and shot her twice, and as he shot her she hollered, 'O, Lord God, help!' and he had his arm around her, and let her down, and run out. Q. You say his wife and this woman were standing at the lattice gate? A. Yes, sir." Mrs. Swigert referred to, did not testify in the case. It was shown that shortly after this tragedy she became violently insane from the fright

and shock, and was, and has since been, confined under verdict and judgment of the Fayette circuit court in the Eastern Lunatic Asylum at Lexington. Evidence was admitted that on the previous evening, and on numerous occasions before, running back for several months, appellant had abused and beat and otherwise mistreated his wife. The motive for this conduct was shown to be because she did not give him money, and some witnesses intimate because she did not give him money to buy whisky. Appellant was without means, idle, and dissipated. He had done little or no work for a number of months, while his wife had been at work as a domestic. Numerous threats are proven in which appellant had said he would kill his wife. The court specifically charged the jury as to all of the evidence concerning previous assaults and threats by the accused; that it was admitted solely for the purpose of showing the state of appellant's mind, if it did show it, and of his motive; and that the jury should not allow same to influence their verdict in fixing the punishment if they should, from the other evidence in the case, find the defendant guilty of the crime for which he was then being tried. Certainly this action of the court was as favorable to appellant as could be expected; indeed, more favorable, probably, than he was entitled to. Whether appellant's wife had in fact been unfaithful to him, or had given him cause to believe or suspect it, is not at all clearly shown by the proof. And, even if it had been, it was also shown conclusively, and by appellant's own testimony, that he continued for weeks to live with her after having been told of her alleged wrong. His subsequent act of killing her can not, then, be reasonably attributed to the supposed jealous frenzy aroused by a sudden and unexpected revelation of his wife's infidelity. Rather, though it be con-

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ceded that he had the suspicion claimed, and reasonable grounds therefor, it appears that he was executing a determination previously and coolly formed, and announced in numerous threats to himself execute upon her a dire vengeance.

Appellant complains of the instructions given by the court to the jury on the subject of insanity. They are in the identical language, excepting names, used by the same court on the trial of Portwood. Portwood's defense was insanity. He was convicted, and sentenced to death. On appeal this court held that the instructions given fairly presented the law, and the judgment was affirmed. *Portwood v. Com.*, 104 Ky., 496 (20 R., 680) 47 S. W., 339. The instructions as to insanity are as follows: "(2) If the defendant did shoot Lucy McCarty, but at the time he shot her the defendant did not have mental capacity sufficient to enable him to know and understand that it was wrong to shoot said Lucy McCarty, the defendant was of unsound mind; or, if the defendant did shoot said Lucy McCarty, but at the time he shot her the defendant was prompted to do such shooting by an impulse, resulting from a diseased mind, of such violence that it overcame the will of the defendant, and constrained him to shoot said Lucy McCarty when he did not wish to shoot her, the defendant was of unsound mind. (3) If the defendant did shoot Lucy McCarty, but at the time he did so the defendant had mental capacity sufficient to enable him to know right from wrong, and if at the time he had will power sufficient to enable him to choose between shooting and refraining from shooting said Lucy McCarty, the defendant was of sound mind; and if the defendant did shoot Lucy McCarty, but at the time he did so the defendant had

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mental capacity sufficient to enable him to know right from wrong, and if his mind was free from disease, then no impulse to shoot said Lucy McCarty, no matter how violent, and no matter how completely it dominated the will of the defendant, was unsoundness of mind." The argument is directed principally against the expression at the close of the third instruction, "if his mind was free from disease, then no impulse to shoot said Lucy McCarty, no matter how violent, and no matter how completely it dominated the will of the defendant, was unsoundness of mind." It must be the contention of appellant's counsel, that any impulse that at the time may be irresistible, will excuse homicide. Happily for society, this is not the law; otherwise an ungovernable temper, or violent, brutish passion, or frenzy caused by indignation or anger, or drunkenness, or altercation would excuse such one. Only persons insane, or who have never reached years of discretion, are not accountable for the commission of crime. Even then the insanity that excuses is such as deprives the person committing the act of his reason or will in that particular transaction. The irresistible impulse recognized by the law is that only resulting from mental disease—from the derangement of the mind caused by a disease of the mind. It is not material how recently the derangement may have occurred. A person acts under an insane, irresistible impulse when, by reason of the duress of mental disease, he has lost the power to choose between right and wrong, to avoid doing the act in question, his free agency being at the time destroyed. 1 Bish. Cr. Law, section 387; *Parsons v. State*, 81 Ala., 577, 2 South., 854, 60 Am. Rep., 193; *Portwood v. Com.*, supra; *Graham v. Com.*, 16 B. Mon., 587; *Brown v. Com.*, 14 Bush, 398; *Moore v. Com.*, 92 Ky., 637 (13 R., 738) (18 S. W., 833).

Another and final complaint is that the attorney for the Commonwealth exceeded his authority and abused his privilege in the closing argument to the jury. The remarks complained of are not shown in the bill of exceptions, nor does it appear from the record that there was objection or exception thereto. We can not, from the record, say that anything was said by the prosecuting attorney in his argument that is the subject of review by this court. Counsel for appellant files with his brief what purports to be a newspaper report of a portion of the Commonwealth attorney's argument. It must be plain that the court could not take notice of such an objection thus presented.

An unobjectionable jury of the community, selected fairly, under the duty alike of enforcing the criminal laws of the State in this case and of determining under proper instructions and guarded legal procedure the fact of the defendant's guilt, have found him guilty of the crime charged. We can not say that the evidence does not support their verdict. In their discretion they have inflicted the severest penalty.

There appears to us to be no error in the record, wherefore the judgment must be affirmed.

Petition for rehearing by appellant overruled.

CASE 70—ACTION BY CHARLES SPEAKMAN AGAINST THE CHESAPEAKE & NASHVILLE RAILWAY FOR PERSONAL INJURIES.—JAN. 29.

Chesapeake & Nashville Ry. v. Speakman.

APPEAL FROM ALLEN CIRCUIT COURT.

JUDGMENT FOR PLAINTIFF AND DEFENDANT APPEALS. AFFIRMED.

LIMITATION—ESTOPPEL TO PLEAD—OBSTRUCTION OF ACTION BY DEFENDANT.

Held: 1. Where limitations is pleaded by a tortfeasor in its answer, it is proper to plead in reply matter showing defendant to be estopped to set up that defense.

2. Kentucky Statutes, section 2532, provides, *inter alia*, that when a personal injury action accrues against a resident of the State, and a prosecution thereof is obstructed by the defendant by indirect means, the time of obstruction shall not be included in the period of statutory limitations. A railroad company represented to an employee, who had been injured, that, if he would not bring suit, they would give him a permanent job, pay him for his time while sick, and pay for his injuries when their extent was determined, and thereby induced him not to sue until limitations had run, after which he was discharged, and told that he would receive nothing further. HELD, that the company was estopped from pleading the statute.

HUMPHREY, BURNETT & HUMPHREY, FOR APPELLANT.

DISMUKES & BASKERVILLE, AND W. C. GOAD, OF COUNSEL.

POINTS AND AUTHORITIES.

1. An acknowledgment of a tort, accompanied by a promise to make amends therefor, does not suspend the operation of the statute of limitations, and is not such an obstruction of the prosecution of an action as contemplated by section 2532, Kentucky Statutes. *Goodwyn v. Goodwyn*, 16 Ga., 117; *Buswell on Limitations*, sec. 37, p. 53; *Angell on Limitations* (6th ed.), sec. 209, p. 219; *Wood on Limitation of Actions*, 133-4, sec. 66; *Oathout v. Thompson*, 20 Johnson (Sup. Ct. of New York), 277; *Thomasson v. Keaton*, 1 Snead, 155; *Hurst v. Parker*, 1 Barns. & Alder Rep., 92 (vol. 18, The Revised Reports, p. 440); *Taylor v. Cranberry I. & C. Co.*, 94 N. C., 525; *Galligher v. Hollingsworth*, 3 H. & McH. (Maryland), 122.

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2. An acknowledgment of a tort and a promise to make amends might possibly be the basis of an independent action for a breach of contract, but they will not avoid a plea of the Statute of Limitations. *Hopperton v. L. & N. R. R. Co.*, 17 Ky. Law Rep., 1322.

ADDITIONAL AUTHORITIES BY W. C. GOAD.

1. In support of contentions under first head: *Carden's Admr. v. L. & N. R. R. Co.*, 101 Ky., 115; *C. & O. Ry. Co. v. Kelley's Admr.*, 20 Ky. Law Rep., 1239; *L. & N. Ry. Co. v. Brantley's Admr.*, 21 Law Rep., 473; *VanVactor's Admr. v. L. & N. Ry. Co.*, 23 Ky. Law Rep., 1743; *Chiles v. Drake*, 2 Met., 146; *Rankin v. Turney*, 2 Bush, 555; *Board v. Jolley*, 5 Bush, 86; *Stillwell v. Levy*, 84 Ky., 379.

2. In support of contentions under second head: Act of 1838, 3 Stat. Law, 550, sec. 6; Kentucky Statutes, secs. 2516 and 2532; *Coleman v. Walker, &c.*, 3 Met., 66; *Kennedy v. Foster's Exrs.*, 14 Bush, 478; *Black on Interpretation of Laws*, p. 141; *Chegary v. Mayor, &c.*, 13 N. Y., 220; *Stone v. Stone*, 1 R. I., 425; *In re Swigart*, 119 Ills., 83; *City of Lynchburg v. Norfolk Co.*, 80 Va., 237; 75 Ga., 225; 19 Wis., 521; 49 Mo., 55; 35 Miss., 25.

LEWIS McQUOWN, FOR APPELLEE.

POINTS AND AUTHORITIES.

1. The statute of limitations can not be taken advantage of by demurrer, unless it appears on the face of the pleading, that the action is barred, and the plaintiff is not within any of the exceptions or savings of the statute. *Brandenburg v. McGuire*, 105 Ky., 10; *Rankin v. Turney*, 2 Bush, 555; *Stillwell v. Leavy*, 84 Ky., 385; *Wood on Lim.*, secs. 7, 8; *Davis v. Ramage*, 23 Rep., 1421.

2. The obstructions referred to in section 2532, Kentucky Statutes, which will avoid the plea of the statute, are (1) an act which would hinder the creditor from suing, notwithstanding his desire to do so, or (2) delay induced by fraud. *Newton v. Carson*, 80 Ky., 309; *Reid v. Hamilton*, 92 Ky., 619; *Davis v. Ramage*, 23 Rep., 1421.

3. One who, by his conduct and fraudulent representations induces another to refrain from bringing suit, until the bar of the statutes is complete, is estopped from pleading the statute. *Newton v. Carson*, 80 Ky., 309; *Davis v. Ramage*, 23 Ky., 1421; *Renackowsky v. Board of Com.*, 122 Mich., 613; *Armstrong v. Levan*, 109 Penn., St., 177; *Wood on Lim.* (note a) sec. 66.

4. One who procures an instruction to be given in all material respects, the same as the one objected to is precluded from

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complaining. *Semple v. Hill*, 2 Rep., 64; *Arnold v. Garth*, 10 Rep., 320; *Clift v. Stockdon*, 4 Litt., 215; *L. & C. Co. Min. Co. v. Welburn*, 11 Rep., 307; *Smith v. Leforce*, 14 Rep., 399.

OPINION OF THE COURT BY JUDGE HOBSON—AFFIRMING.

Appellee, Charles Speakman, was a brakeman in the service of appellant, and while thus engaged was injured on July 22, 1899, by reason of a trestle giving away, precipitating the train some thirty feet to the ground below. The giving away of the trestle was due to the fact that the timbers had become rotten. While there is some conflict in the evidence as to the extent of his injuries, the verdict of the jury for \$1,500 is not excessive, or palpably against the evidence. The instructions fairly submitted the questions of fact to the jury, and there is but one matter that we deem it necessary to notice at length. The action was not filed until January 5, 1901. The defendant pleaded limitation of one year. The plaintiff replied, in substance, that he had been prevented from bringing the action by the fraud of the defendant, and that it was estopped to plead limitation. We see no objection to the form in which the issue was raised. The matter set up in the reply was in avoidance of the plea of limitation made in the answer, and was properly pleaded in the reply. The court, by an instruction, aptly submitted to the jury the truth of these facts, and, they having found for the plaintiff, the question is, were the facts sufficient to stop the running of the statute? For, while the evidence was conflicting, the verdict in favor of the plaintiff is not palpably against the evidence. The facts referred to are as follows, the plaintiff's testimony being taken as true: Shortly after he was hurt, and while he was sick, appellant's superintendent represented to him that, if he would not sue the appellant, his time should be allowed to run on,

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and his wages paid until he recovered; also that he would be paid by appellant for his injuries when time showed what their extent was; and he should have in its service a permanent position as long as he lived, or as long as the superintendent remained on the road. These promises were renewed from time to time until after the end of the year from the time he was hurt, and then he was told that they would pay him nothing, and that his claim was barred by limitation. It is shown by the proof that the company did keep him on its pay roll from the time he was injured until he left its service shortly before the bringing of the suit, and paid him full wages for the time he was sick. It was charged in the pleading that these representations and promises were falsely and fraudulently made for the purpose of inducing him to bring no action within the year, and that he was induced by them not to bring the action, believing that the promises were made in good faith, and would be kept. Appellee testified that shortly before the year ran out the promises were renewed, and he was requested to get up proofs for the payment of his claim, which he did, and submitted to the superintendent. These proofs are produced, but the superintendent says they were gotten up for a different purpose.

It is earnestly insisted for appellant that a promise to pay can only revive a contract debt, and that an acknowledgment of liability for a tort that is barred by limitation can not revive it. This is true, but the promises and representations here relied on were made before the claim was barred by limitation, and the question is, may the defendant be estopped, by conduct like this, from relying on the lapse of time during which, by such means, it prevented the bringing of the action? Section 2532, Kentucky Statutes, is as follows: "When a cause of action mentioned

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in the third article of this chapter accrues against a resident of this State, and he, by departing therefrom or by absconding or concealing himself, or by any other indirect means obstructs the prosecution of the action, the time of the continuance of such absence from the State or obstruction shall not be computed as any part of the period within which the action may be commenced." In *Newton v. Carson*, 80 Ky., 309 (4 R., 1), about the time the petition was filed the surety in a note went to the plaintiff, and told him that if he would not sue on the note, and save the defendant any further cost, he would, during the next term of the court, confess judgment. He thus procured the plaintiff not to issue summons on the petition, and by some feigned excuse or other protracted the matter until the last day of the term, when, the statute having run, he pleaded limitation. The court held the plea bad, and said that to countenance such chicanery was to make the court a secure means for perpetrating frauds. This rule was followed in *Reid v. Hamilton*, 92 Ky., 619 (13 R., 849) (18 S. W., 770). In *Wood, Lim.*, section 66, the rule, as relied on by appellant, is fully stated, but in note "a" to this section (3d Ed.) it is said: "While an action of tort can not be based upon or revived by a promise, yet, if the defendant's conduct induces the plaintiff to refrain from bringing an action of tort within the period fixed by the statute, the defendant may be thereby estopped to rely upon the statute." In *Armstrong v. Levan*, 109 Pa., 177, 1 Atl., 204, which was an action of tort like this, where there was a plea of limitation, and a similar matter in avoidance relied on, the court said: "The plaintiff in error has given us an elaborate argument to show that a promise to pay after the statute has run will not revive a tort, and has cited numerous authorities in support of this prop-

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osition. We concede his law to be sound. His authorities fully sustain this point. The difficulty in his way is that they do not meet his case. It was not the question of the revival of a tort by a promise to pay made after six years. The conversation referred to occurred before the statute had run, and it was a distinct promise to pay in consideration that the plaintiff below would not sue. If, therefore, she relied upon this promise; if she was thereby lulled into security, and thus allowed the six years to go by before she commenced her suit—with what grace can the defendant now set up the statute? The promise operated, not to revive a dead tort, but as by way of estoppel. It has all the elements of an estoppel. The plaintiff relied and acted upon it. She has been misled to her injury. But for the defendant's promise, she would have commenced her action before the six years had expired." This case was followed and approved in *Renackowsky v. Board*, 122 Mich., 613, 81 N. W., 581. *Hopperton v. Railroad Co.* (17 R., 1322) (34 S. W., 895), is rested on the ground that the reply there was insufficient, as the plaintiff had no right to consult his adversary as to when the statute would run, and could not be allowed to plead ignorance of the law, even if wrongfully advised by counsel; but the court added: "This averment, however, as coupled with the promise to keep the plaintiff in its employ if he would not sue, might be held sufficient if there had been an averment that he had been retained in accordance with the promise, and then discharged from the service, it being the inducement for him to forbear bringing his action." What follows in the opinion in regard to the propriety of an amended petition has reference to the case of the plaintiff's recovering damages for a breach of the contract, and not on his original cause of action. In the case before

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us appellee was retained in the service, in accordance with the promise. This was the inducement for him to forbear from bringing his action, and after the end of the year he was discharged from service. The suit here was brought on the original cause of action. The defense of limitation could not be presented by demurrer, and it was, therefore, unnecessary for the plaintiff to anticipate this defense in his petition, for the defendant might have chosen not to plead the statute. When it did plead it, it was proper for the plaintiff to reply, and set up the matter in avoidance of the plea, showing that the statute had not run. No matter need be set up in an amended petition which might not properly be put in the petition in the first place, and it was improper for the plaintiff in this case to have set up the matter relied on in the reply in his petition, unless he sought damages for the breach of the contract.

Judgment affirmed.

Judge Settle not sitting.

CASE 71.—ACTION BY AUGUST RODEMER AGAINST GEORGE RETTIG, EXECUTOR, AND ANOTHER ON A NOTE.—JAN. 29.

Rodemer v. Rettig, &c.

APPEAL FROM KENTON CIRCUIT COURT.

JUDGMENT FOR DEFENDANTS AND PLAINTIFF APPEALS. REVERSED.

GIFT—STIPULATION IN NOTE—EFFECT.

Held: 1. A stipulation in a note executed for a valuable consideration, and due one day after date, provided that it should become null and void on the death of the payee. There was evidence of an intent that the daughter of the payee, who was the wife of the maker, should have it as a gift. The maker paid interest thereon until the death of the payee, but the note was never de-

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livered to the daughter. **HELD**, not to constitute a gift *inter vivos*.

2. A stipulation in a note that it should become null and void on the death of the payee, though intended to constitute a gift of the note, does not affect the validity of the note, where it was never delivered to the donee, but it remained an asset of the estate on the death of the payee.

HARVEY MYERS, ATTORNEY FOR APPELLANT.

George Rettig being indebted to his wife's mother, Mrs. Rodemer in the sum of \$2,000, executed to her his note, as follows:

"Covington, Ky., March 3, 1896. One day after date, I promise to pay to the order of Barbara Rodemer, \$2,000, with interest at five per cent, per annum. This note, however, to become null and void on the death of said Barbara Rodemer."

Signed, "George Rettig."

The note was never delivered to Rettig, but was retained by Mrs. Rodemer up to her death, April 13, 1899. By her will after a special bequest of \$300, she provided as follows: "All the rest of my estate, consisting of money, I hold in building associations, notes, and what moneys I may have at the time of my death I give, devise and bequeath to my son, August Rodemer and my daughter, Mary Rettig.

1. We contend that the note was either an advancement or a gift. If an advancement, it should be charged against the share of the daughter, Mary Rettig. If a gift it failed, because there was no delivery.

2. The writing upon the face of the note was an effort to make a testamentary disposition of the property and is in conflict with the laws of the State regulating testamentary dispositions, and therefore void.

AUTHORITIES CITED.

Bowles v. Winchester, 8 Bush, 12; Am. & Eng. Ency. of Law, 2d ed.; Simmons v. Savings Society, 31 O. S., 457; Gana v. Fisk, 43 O. S., 462; Flanders v. Blandt, 45 O. S., 108; Starr, 9, O. S., 74; Martin v. Funk, 75 N. Y., 134; Keepers v. The Deposit Co., 56 N. J. L., 302; McChord's Admr. v. McChord, &c., 77 Mo., 166; Cutting v. Gilam, 4 N. H., 147; Meriwether v. Morrison, 78 Ky., 573; Stephenson's Admr. v. King, &c., 81 Ky., 430.

H. J. GAUSEPOHL, ATTORNEY FOR APPELLEES.

I contend that the \$2,000 in controversy was a contract entered into by the parties thereto, in which it is expressly stipulated that the note was absolutely void at the death of the

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payee, and that all she desired was five per cent. interest on the \$2,000, and no more, as long as she lived, and when she died the note became void and formed no part of her estate. *McGlasson v. McGlasson*, 56 S. W., 5; *Meriwether v. Morrison*, 78 Ky., 753.

OPINION OF THE COURT BY JUDGE PAYNTER—REVERSING.

Barbara Rodemer died testate in Kenton county on April 13, 1899, leaving two grown children, a son and a married daughter, appellant and appellee Mrs. Rettig. After a special bequest of \$300, she disposed of the rest of her estate in the following language, to-wit: "All the rest of my estate, consisting of money I hold in building associations, notes, and what moneys I may have at the time of my death, I give, devise and bequeath to my son, August Rodemer, and my daughter, Mary Rettig." She left personal property, consisting of notes and stock in building associations, other than the note here in controversy, amounting to \$2,432.79. The question involved is whether or not a note which the appellee George Rettig executed to her is part of her estate. It is as follows: "2,000.00. Covington, Ky., March 3d, 1896. One day after date I promise to pay to the order of Barbara Rodemer two thousand dollars, with interest at 5 per cent. per annum. This note, however, to become null and void on the death of said Barbara Rodemer. [Signed] George Rettig. No ——. Due ——" She collected the five per cent. on the note from the time it was executed until the time of her death, except the interest for the last year. George Rettig executed his note to her for \$2,500 for borrowed money, and afterwards paid \$500 on it. For the balance of the note he executed the \$2,000 note. The \$2,000 note remained unpaid at her death, and the payor claims it was a gift to his wife. As an evidence of it he relies upon the terms of the note and other testimony tending to show that she intended

her daughter to have it as a gift. The appellant insists there never was any delivery of the note, and therefore it was not a gift *inter vivos*, while the appellee insists that it was by the terms of the note, and that the testimony to which we have alluded shows that it was a gift. It is essential to the validity of a gift *inter vivos* or *causa mortis* that there shall be a delivery to the donee, and the property or thing given must immediately pass, and be irrevocable by the donor. Duncan's Adm'rs v. Duncan, 5 Litt., 12; Walden's Adm'r v. Dixon, 5 T. B. Mon., 170; Knott's Adm'r v. Hogan, 4 Metc., 102. It was held in Payne v. Powell, 5 Bush, 252, that a writing signed by a man purporting to make a gift of his personal estate to his sons is ineffectual because there was no actual or constructive delivery of either the writing or the property by the donor, and no acceptance by the donee. In that case the court held that a transfer by writing alone will not satisfy the requirement of delivery. Mrs. Rodemer retained possession of the note from the time of its execution until the time of her death, and controlled it, as evidenced by the fact that she collected the interest thereon annually from the payor. There was no delivery of the note at any time actually, symbolically or otherwise. The note was made payable one day after date, and there was no restriction in its terms that prevented her from compelling payment of it at any time. Suppose the following language had been indorsed on the back of the note, and signed by her, to-wit: "This note, however, to become null and void upon my death." It would not have had the effect of preventing her from collecting the note during her lifetime, nor would it have been a delivery of it to the payor. It would have been just as ineffectual, from a legal standpoint, as if it had been written in the face of the note, as was done in this

case. The note was given for a valuable consideration. In the case of Knott's Adm'r v. Hogan, 4 Metc., 100, the writing was executed at the time the note for money loaned was executed. It was stipulated that, if the payee should not collect the note in her lifetime, her representatives were directed to surrender it to the payor, "as I intend it as a gift from me to him." The court held that was not a valid gift. It is manifest from this conclusion of the court that the stipulation in the note did not amount to a gift *inter vivos*, as there was no delivery of the note. It is nothing more than an intention to make a gift. Counsel for appellee relies upon the case of Meriwether v. Morrison, 78 Ky., 573, Stephenson's Adm'r v. King, 81 Ky., 425 (5 R., 374), 50 Am. Rep., 173, and, also, upon the case of McGlasson v. McGlasson's Ex'r (24 R., 1843) 56 S. W., 510. The Meriwether case and the Stephenson case do not support counsel's position. In the Meriwether case the donor wrote upon the notes, "I transfer the within note as a gift to Miss Agnes Morrison," and handed the notes to his nephew, directing him to put them away, and give them to her after his death, and informed Miss Morrison that he had given her the notes. The court held that the jury was authorized to find that there had been an actual delivery of the notes to the nephew, as trustee for Miss Morrison. In the Stephenson case the court held that, when the donor delivered to the donee a letter containing a full description of her notes and bonds, it was a sufficient delivery to make the gift *causa mortis*. In that case the court regarded that delivery was essential, and held that delivery of the letter was equivalent to a delivery of the notes. The case of McGlasson v. McGlasson's Ex'r does support the contention of counsel for the appellee. The consideration of the note in that case was stip-

ulated to be for certain personal property. It contained this language: "If not paid during the holder's life, Leonard McGlasson, this note is void, or not attempted to be collected." The court seems to hold that, as the note was not collected during the lifetime of the payee, it was void, according to the stipulation in the note. No case is cited in support of its conclusion. It is not in accord with the rulings of this court on the question of what acts constitute valid gifts, and it is directly in conflict with *Knott's Adm'r v. Hogan*. We are of the opinion that the transaction as to the note did not amount to a gift of it to the daughter of the testatrix, but that it is a part of the estate devised to her son and daughter, and should be treated as an asset of the estate. In so far as the case of *McGlasson v. McGlasson's Ex'r* is in conflict with this opinion it is overruled.

Judgment is reversed for proceedings consistent with this opinion.

Petition for rehearing by appellee overruled.

Board of Education City of Lexington, &c. v. Moore.

CASE 72—ACTION BY L. J. MOORE AGAINST BOARD OF EDUCATION CITY OF LEXINGTON, &c. TO ENJOIN THE PAYMENT OF AN INCREASE SALARY TO CITY TREASURER.—JAN. 30.

Board of Education City of Lexington, &c. v. Moore.

APPEAL FROM FAYETTE CIRCUIT COURT.

JUDGMENT FOR PLAINTIFF AND DEFENDANTS APPEAL. AFFIRMED.

MUNICIPAL CORPORATIONS—SALARY CITY TREASURER—CHANGE DURING TERM—CONSTITUTIONAL LAW.

Held: 1. Const. section 161, declares that the compensation of any city officer shall not be changed after his election, or during his term of office. Kentucky Statutes, section 3212, provides for the maintenance of a board of education in a city which, by section 3214, has control of the school funds. Section 3225 makes the treasurer of the city treasurer of such board. Section 3064 declares that the general council of the city shall fix the salary of each officer, and that no such salary shall be changed after his election, or during his term of office. During the term of the city treasurer the board of education allowed him a certain salary as treasurer of such board. **HELD**, that the allowance was unlawful, and the fact that additional services had been imposed on the officer during his term did not authorize an increase of his salary during said term.

MORTON & DARNALL, ATTORNEYS FOR APPELLANT.

Our contention is that section 161 of the Constitution refers to a change made in the salary or compensation for services of an officer by the political body or authority charged with the duties of fixing such salary. The city did fix the compensation of the city treasurer for the services to be rendered to the city, but did not fix the compensation to be rendered by him for the Board of Education. He acted in a dual capacity, and each of the corporations deals with him in many respects as if the services performed by him were rendered by different persons. While the statute does not in express terms confer upon the Board of Education the power to provide a salary to the city treasurer for services he is required to render the board, it is apparent that it contains no limitation upon its power to

114	640
1128	114
128	115
1128	539

114	640
131	380

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make such provision, and we contend that the power given the board to require services to be rendered by the treasurer, carries with it an obligation to provide compensation for such services.

J. SOULE SMITH, A. M. BAKER AND L. J. MOORE, FOR APPELLEE.

Our contention is:

1. That the act of the school board in giving the city treasurer, Kaufman, the salary charged in the petition is not within the powers delegated to the board under the law creating it a corporation.

2. If the act is not a violation of its charter, then it is a violation of the Constitution of the State.

In the absence of express authority, the board of education can not legally pay out any money as compensation to a treasurer.

We claim that the law creating the said board does not give it the power to pay the city treasurer any salary in addition to that provided by the city council. Its duties are to conduct the public schools of the city.

The act complained of in the petition is in violation of the Constitution for two reasons, (1) because it increases the salary of the city treasurer during his term of office, and (2) because it diverts the common school fund from the purpose to which it is dedicated by the Constitution.

The city treasurer is *ex officio* treasurer of the board of education, and no officer is entitled to compensation for performing *ex officio* services except that allowed as his stated salary or by express provision of some statute.

AUTHORITIES CITED.

Kentucky Statutes, secs, 3132, 3212, 3214, 3215, 3219, 3220, 3226, 3227; Kentucky Constitution, secs. 161, 235; Black on Interpretation of Laws, p. 319; Anderson v. City of Wellington, 10 Am. St. Rep., 175; Kneper v. City of Louisville, 7 Bush, 603; City of Covington v. Mayberry, 9 Bush, 304; Collins v. Henderson, &c., 11 Bush, 74; Halbert v. Sparks, 9 Bush, 259; Underwood v. Wood, &c., 14 Ky. Law Rep., 129; Posy, Supt., &c. v. Board Trustees, 19 Ky. Law Rep., 466.

OPINION OF THE COURT BY JUDGE SETTLE.

By chapter 89, art. 3, Kentucky Statutes, Lexington is designated as a city of the second class. Section 3212 of the statute provides for the maintenance of a system of

public schools in that city under the control of a board to be styled the "board of education," consisting of two trustees from each ward of the city; and the appellant board of education was created in this way. The board of education, by section 3214, is given control of all the funds that are dedicated to the use of the public schools of the city, and the title to all property, real and personal, in the city, used as public school property. Section 3225 directs that "the treasurer of the city shall be treasurer of the said board of education, and as such shall keep separate and distinct from all other funds, all moneys, bonds and securities belonging to, or which may hereafter be dedicated or set apart for public schools, and shall pay out or deliver any of said funds, bonds or securities upon the warrant of said clerk and approved by the president of the board of education, and shall perform such other duties as may be prescribed by said board." Section 3131 provides for the election of the treasurer by the qualified voters of the city, and prescribes the qualifications of such treasurer; and section 3132 provides that "the treasurer shall give such bond and receive such salary as the general council shall by ordinance provide." Section 3064 declares that: "The general council, unless otherwise provided by law, shall fix the salary and compensation and prescribe the duties of all officers, deputies and employes of the city except as to the officers in office when this act takes effect. Such salary shall be fixed before their election or employment, and the salary of no city officer, deputy or employe when so fixed shall be changed after his election, employment or appointment during his term of office, or employment." The appellant M. Kaufman was, in November, 1899, duly elected treasurer of the city of Lexington by the voters thereof for a term of four years

beginning January 1, 1900, and on the last-named date he executed bond, took the oath required by law, and entered upon the discharge of the duties of the office of treasurer; his salary as such treasurer having theretofore been fixed at \$1,800 per annum by ordinance adopted by the general council of the city. From and after his induction into office Kaufman received as treasurer the funds under the control of the board of education that were dedicated to school purposes. On June 4, 1900, and several months after the election and qualification of Kaufman as treasurer, the board of education, by a vote of a majority of its members, allowed him a salary or compensation for his services rendered and to be rendered as such treasurer of \$200 per annum, and soon thereafter \$100 of the salary thus allowed was paid him by the board of education. After the allowance of salary and the payment of \$100 to Kaufman by the board of education, appellee, L. J. Moore, a citizen, resident and taxpayer of the city of Lexington, brought suit in the Fayette circuit court against appellants Kaufman and the "board of education," seeking a cancellation of the resolution allowing the salary of \$200 per annum to the former, and praying that the latter be enjoined from paying him any further sum of the salary allowed. Demurrers were filed by appellants to the petition and overruled. Kaufman then filed answer, in which he, in substance, averred that by section 3225 of the statute, *supra*, he was required, as treasurer, to keep, and did keep, separate and distinct from all other funds, all moneys, bonds and securities dedicated to the use of the public schools of the city which came into his hands, and that the city council of Lexington, in fixing his salary at \$1,800 per annum, did so without having in contemplation the services he would be required to render the board of education

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as treasurer; and, further, that the board of education had the right, in the exercise of the power and discretion conferred upon it by law, to make the appropriation in question by way of salary or compensation to him for the alleged extra services rendered by him as its treasurer. Appellee filed a demurrer to the answer, which was sustained by the court. Kaufman failing to plead further, and no answer having been filed by the board of education, the lower court thereupon rendered judgment granting the prayer of the petition. To this judgment appellants excepted, hence this appeal.

We are of the opinion that the judgment was proper. Section 161 of the Constitution provides that "the compensation of any city, town or municipal officer shall not be changed after his election, or appointment or during his term of office." Besides, we find that section 3064 of the statute, *supra*, expressly declares that the general council of the city shall fix the salaries of all the city officers before their election or appointment, and the "salaries of no city officer, deputy or employe when so fixed shall be changed after his election, appointment or employment, during his term of office or employment." The statute (section 3225) requires Kaufman, as treasurer of the city, to act as treasurer for the board of education. Whatever services he performed for it in this capacity were not rendered by reason of any employment from it, for the board had no authority, under the statute creating it, to employ a treasurer. Kaufman does not hold two offices, for performing the duties of which he may receive two salaries, but only one office, the salary of which (\$1,800) is paid by the city of Lexington. In other words, by virtue of his election as treasurer of the city of Lexington, he became and is *ex officio* treasurer of the board of education.

The law applicable to this case was, we, think, correctly announced by this court in *Jefferson Co. v. Waters*, 111 Ky., 286 (24 R., 816) 70 S. W., 40. Waters was treasurer of Jefferson county. Before his election the salary of that office was fixed at \$1,000, the county furnishing his office, fuel, lights and janitor service. Waters presented a petition to the fiscal court asking for, and obtained, an additional allowance of \$1,000 as expenses to be paid annually. From this allowance the county appealed to the circuit court. In that court an amended petition was filed, which set out substantially these facts, viz.: "That when appellee was elected county treasurer, and when the salary was fixed by the fiscal court at \$1,000, it was thought that under the law the county levy did not extend over property in the city of Louisville, but only reached property outside of Louisville; and that since appellee's election, and since the salary was fixed at \$1,000, it had been legally determined that the county levy extended over all the property in the county, including that in the city, and that this decision added to the amount of money coming into his hands by about \$140,000, and that the duty of accounting for this additional sum was not intended to be covered by the salary of \$1,000 fixed." Upon appeal to this court the judgment of the circuit court approving the allowance made by the fiscal court to Waters was reversed, this court holding that under section 161 of the Constitution and section 934 of the Kentucky Statutes the compensation of the county treasurer can not be increased during his term of office, and that the allowance made was an evasion of the constitutional inhibition. The same doctrine was announced by this court in *Com. v. Carter*, 21 R., 1509, 55 S. W., 701, and also in *Bank v. Johnson*; 108 Ky., 507 (22 R., 210) 56 S. W., 825. Other decisions of this court might

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be cited in support of this view, but we deem it unnecessary to do so. Clearly, the allowance of \$200 per annum to Kaufman by the board of education was violative of section 161 of the Constitution, and of the provisions of section 3064 of the statute, *supra*, as it was a change and increase of his salary as treasurer, made after his election, and during his term of office as such.

Judgment affirmed.

CASE 73—AN ACTION BY J. L. WATKINS AGAINST PAT MOONEY, INVOLVING THE TITLE TO THE OFFICE OF MEMBER OF THE BOARD OF POLICE AND FIRE COMMISSIONERS OF THE CITY OF LEXINGTON.—JAN. 30.

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APPEAL FROM FAYETTE CIRCUIT COURT.

FROM A JUDGMENT DISMISSING PLAINTIFF'S PETITION, HE APPEALS.
REVERSED.

MUNICIPAL CORPORATIONS—MAYOR—ABSENCE FROM CITY—POWERS OF PRESIDENT OF BOARD OF ALDERMEN—APPOINTMENT TO FILL VACANCY IN POLICE DEPARTMENT—CONFIRMATION BY BOARD OF ALDERMEN—"ABSENCE" DEFINED.

Held: 1. Kentucky Statutes, section 3204, providing that, in the absence of the mayor from a city, the president of the board of aldermen shall act as mayor, does not authorize the president of the board to appoint a member of the board of police and fire commissioners created by section 3137 where the mayor was absent for about a day at another city about twenty-five miles distant; the cities being connected by railroad and telegraph and telephone service, and where there was no emergency requiring the president of the board to act. The word "absence," as used in this statute, is not merely a physical absence of the mayor from the city, but such an absence as renders him incapable for the time being of performing the act that may be in question, which act must present such a necessity for immediate attention as to require it to be *then executed*.

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2. Kentucky Statutes, section 3137, creates a board of police and fire commissioners, for cities of the second class, of four members, with the mayor, *ex officio*, chairman, and directs that the four commissioners shall be appointed by the mayor, subject to the approval of the board of aldermen, and the mayor is authorized to fill all vacancies in the board. Section 3108 expressly confers on the mayor the power to fill all vacancies in office, unless otherwise provided. **Held**, that a mayor's appointment of a member of the board of police and fire commissioners to fill a vacancy need not be confirmed by the board of aldermen.

BRECKINRIDGE & SHELBY AND ALLEN & DUNCAN, FOR APPELLANT.

J. Soule Smith having resigned as a member of the board of police and fire commissioners of the city of Lexington, the mayor appointed the appellant, J. L. Watkins to fill the vacancy, who took the oath of office and entered upon his duties. A few days thereafter, the mayor went to the city of Frankfort, twenty-five miles distance, which is connected with the city of Lexington by train and by telephone and telegraph, and was gone about twenty-four hours. During this absence, certain members of the board of aldermen in pursuance of a prearrangement had the president of the board of aldermen, assuming to act as mayor, to call the general council together in special session at nine o'clock in the morning, to whom he reported the appointment of Watkins, previously made by the mayor, which appointment the board rejected, and the president of the said board then appointed the appellee, Mooney, to said office, which appointment the said board confirmed and then adjourned.

When the mayor returned from Frankfort he repudiated everything that had been done in his absence, as illegal, refused to recognize the change that had been made and continued to recognize Watkins as a member of the board of police and fire commissioners.

The appellant, Watkins, has filed his petition in the Fayette circuit court setting up these facts and asking that he be adjudged to be entitled to said office with a prayer for an injunction to which petition a demurrer was sustained by the lower court and his petition dismissed, from which judgment this appeal is prosecuted.

Our contention is:

1. That the president of the board of aldermen can never act as mayor unless the public interests require and make it the duty of the mayor to act *then*, and he is unable to act; that when such an occasion is presented the right of the president of

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the board of aldermen to act is limited to the necessities of the particular emergency; that his right to act does not draw to him all of the power of the mayor.

2. That the word "absence" used in the statute does not mean mere physical absence, but such absence as will prevent the mayor from performing an urgent duty which the public interests require should not be delayed.

3. Assuming for the sake of argument that the absence referred to means physical absence, the plaintiff could not be ousted from his office in the manner attempted.

4. Assuming that the plaintiff is an officer *de facto*, and that there exists a real and honest contention concerning the title to the office, is he not entitled to be protected in his possession of the office by the writ of injunction?

REFERENCES AND CITATIONS.

Kentucky Statutes, secs. 3203, 3204, 3049, 3137, 3108; High on Injunctions, 3d ed., secs. 1312, 1315 and cases cited; Mechem on Public Officers, sec. 994, and cases cited; Beach on Modern Equity Jurisprudence, sec. 671, and cases cited; Steiglen v. Beach, Circuit Judge, (Mich. 1901), 87 N. W., 449; Rhodes v. Driver, (Ark. Nov., 1901), 65 S. W., 106; People, *ex rel.* Tennant v. Parker, 3 Nebraska, 409; s. c., 19 Am. Rep., 634; State *ex rel.* Warmouth v. Graham, 26 La. Ann., 568; s. c., 21 Am. Rep., 551; People v. La Combe (N. Y.) 1 N. E., 599; Mayor of Detroit v. Moran, (Mich.) 9 N. W., 252; O'Malley v. McGinn, (Wis.) 10 N. W., 515; State v. Byrne, (Wis.) 73 N. W., 320; Lynde v. Winnebago County, 16 Wall., 6; *In re* Cleveland v. Mayor, (N. J.) 18 alt., 67; People v. Van Anden, (Mich.) 74 N. W., 1009; Bernard v. Taggart, (N. H.) 25 L. R. A., 613.

MORTON, DARNALL & WILSON, WEBB & FARRELL, AND J. D. & G. R. HUNT, FOR APPELLEE.

SUMMARY.

1. The motives of a co-ordinate branch of government will not be inquired into by the judiciary, where the power exercised or the act done comes within the domain of its delegated or authorized powers or acts. Taylor v. Beckham, 21 Ky. Law Rep., 1743.

2. Where a quorum is present, a majority of a quorum can do any legal act, even though other persons present take no part. Wheeler v. Commonwealth, 98 Ky., p. 63; Launtz v. The People, *ex rel.* Sullivan, 113 Ill., 137; State, *ex rel.* Shinnich v. Green, 37 Ohio St., 227; Rushville Gas Company v. City of Rushville,

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23 N. E. R., 72; State of Ohio, *ex rel.* Cline v. Wilkesville Township, 20 Ohio St., 288.

3. Under the charter of cities of the second class the approval of the board of aldermen is necessary before the appointment of a person to the position of a member of the board of police and fire commissioners is complete. Sec. 3108, Kentucky Statutes; sec. 3137, Kentucky Statutes.

4. Under the charter of the city of Lexington, the president of the board of aldermen has the right to act as mayor during the absence or disability of the mayor, and has the right to perform every act, which the mayor could have performed, if present. Secs. 3204 and 3203 of Kentucky Statutes; People, *ex rel.* Lennant v. Parker, 3 Neb., 409; Warmouth v. Graham, 26 La., 568, Mayor of Detroit v. Moran, 9 N. W., 252; O'Malley v. McGinn, 10 N. W., 517; State v. Byrne, 73 N. W., 320; People v. Van Anden, 74 N. W., 1009; Lynde v. Winnebago County, 16 Wall., 6; *In re* Cleveland, 18 Atl. Rep., 67.

5. The injunction was properly refused by the court.

OPINION OF THE COURT BY JUDGE O'REAR—REVERSING.

This suit involves the title to the office of member of the board of police and fire commissioners of the city of Lexington, appellant and appellee each claiming to be the rightful incumbent. Lexington is a city of the second class. The statute providing a system of government for these cities creates a board called the "Board of Police and Fire Commissioners," which is composed of the mayor of the city, *ex officio*, the chairman of the board, and four other members appointed by the mayor. This board is created by section 3137, Kentucky Statutes, which section is as follows: "The mayor, subject to the approval of the board of alderman, shall appoint four citizens and freeholders of the city, who shall have been electors of the city for five years preceding their appointment, and who shall not be less than thirty years of age, and not related to the mayor by blood or marriage, who, together with the mayor, shall compose a board of police and fire commissioners. The mayor shall be *ex officio* chairman of said board. Said

commissioners shall be appointed for a term of one, two, three and four years, respectively, upon the taking effect of this act; and every year thereafter, as the terms of office of the said commissioners shall expire, respectively, there shall be one commissioner appointed for a term of four years, and the mayor shall fill all vacancies that may occur in said board. The salaries of the commissioners may be fixed by the general council. The city clerk shall act as clerk of said board." The four members provided for by the section were originally appointed by the mayor and confirmed by the board of aldermen. One of these members was J. Soule Smith. Before this controversy arose, he resigned, thus creating a vacancy in the board. Henry T. Duncan was then, and is yet, the mayor of Lexington. After the vacancy above named occurred, the mayor appointed appellant, J. L. Watkins, to fill it, and he accepted it. Whether this appointment was communicated by the mayor to the board of aldermen, and by that body confirmed and approved, does not appear from the record, though it is assumed in argument that it was not so reported or confirmed. Shortly thereafter, and on the 21st day of January, 1902, the mayor had occasion to come to Frankfort, where the State Legislature was in session, for the purpose of attending to business before that body, or some committee, affecting the interest of cities of the second class. He left Lexington in the afternoon of the 21st, and did not return until the following afternoon. Lexington is about 25 miles distant from Frankfort, connected by railroad, and between these two cities several passenger trains are run each way each day. The cities are also connected by telegraph and telephone service, affording opportunities for constant communication by these means. Section 3204, Kentucky Statutes, reads as follows:

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"In the event of the absence or disability of the mayor, the president of the board of aldermen shall act as mayor, and in event of the absence or disability of both the mayor and the president of the board of aldermen, the president of the board of councilmen shall act as mayor." W. H. McCorkle was the president of the board of aldermen. After the mayor's departure for Frankfort, McCorkle issued notices convening the board of aldermen in extraordinary session at an early hour on the morning of the 22d, "to receive a communication from the mayor." A quorum of the board met as called, whereupon McCorkle, affecting to act as mayor *pro tempore*, communicated to that body the appointment of appellant, Watkins, previously made by Mayor Duncan, and submitted this appointment to the board as a nomination for their approval and confirmation. The board of aldermen rejected the appointment, whereupon President McCorkle immediately transmitted to the board the nomination of appellee, Mooney, to fill the vacancy caused by the resignation of Smith, which nomination was confirmed and approved by the board. It is charged that this action by McCorkle and his associate members of the board of aldermen was the result of a conspiracy upon their part, and of others acting with them, to defeat the mayor's right of appointment, and to install such members of the board of police and fire commissioners as would be unacceptable to him, and to deprive him of his legal powers pertaining to his office.

The facts above stated are gathered from the petition of appellant, Watkins, filed against appellee, Mooney, in the Fayette circuit court, to prevent the exercise by Mooney of the duties and privileges of the office which they were each claiming. The circuit court sustained a demurrer to this petition, and dismissed the action, wherefore this ap-

peal, which presents two questions of law: (1) Was the mayor absent, within the meaning and contemplation of the statute? (2) Does the statute require appointments made by the mayor to fill the vacancies in the board of police and fire commissioners of cities of the second class to be confirmed by the board of aldermen before they become effective?

The court does not regard the allegation of the alleged conspiracy as one at all material in this case. In our opinion, the question is purely one of power. One department of government will not undertake to inquire into, and can not ordinarily investigate, the motives prompting members of a distinctly different department in the exercise of power conferred upon them by law.

It is the contention of appellee that the word "absence," as employed in this statute, has a well defined and understood meaning; that it should be given its strict, literal meaning—to be away from or to be withdrawn from a place; and that it has reference solely to a physical absence of the subject. Many words of common use in our language have two or more meanings. It is not infrequent that a word having one meaning in its ordinary employment has a materially different or modified meaning in its legal use. This word "absence" is a fair example. It has been held that one may be absent, though actually present, as where a judge, though, on the bench, does not sit in the cause. He is there taken as absent in contemplation of law. *Bingham v. Cabbot*, 3 Dall., 19, 1 L. Ed., 491; *Byrne v. Arnold*, 24 New Br., 161. It has also been held to mean "not present." *Paine v. Drew*, 44 N. H., 306. It has been held, too, as not meaning "out of the State only." *James v. Townsend*, 104 Mass., 367. "Absence" and "disability" are words which, from their use

in statutes, may have two different meanings. They are quite frequently found in some form in the statutes of this and other States, as well as in the Constitutions of many of the States. The Legislature has not defined the sense in which either of the words is to be construed; leaving their construction and application to be gathered from the intent of the act or section in which they may be found, by the light of its subject-matter and evident purpose. President Arthur, in his first message to Congress, clearly and ably set forth the ambiguity of the term "disability" as used in the Constitution of the United States, providing that "in case of the removal of the president from office, or of his death, resignation or disability to discharge the powers and duties of said office, the same shall devolve upon the vice-president." etc. Yet "disability" is a word of scarcely less ambiguity, as generally used in common parlance, than "absence." In some States their statutes provide that the chairman of the board of aldermen, or other officer holding the position of vice-mayor, shall act in case of the absence of the mayor from the city. Such, for example, are the cases of *O'Malley v. McGinn* (Wis.) 10 N. W., 515; *In re Cleveland* (N. J. Sup.) 18 Atl., 67. In other cases cited it was shown that the mayor was absent from the State, and the court found that he could not perform the duty which the vice mayor was assuming to do. Such are *State v. Byrne* (Wis.), 73 N. W., 320, and *People v. Van Anden* (Mich.), 74 N. W., 1009. In the case first named, the facts do not show, in the opinion, how far the mayor was from the city, nor how long he had been away, nor the particular urgency of the action of the vice mayor. In the last-named case the mayor was shown to have been absent from the State for two weeks, and as having expressed a purpose, when he left, of being absent for three

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weeks. It is a difficult task, if not an impossible one, to lay down a rule that could apply to all cases, defining the meaning of the word "absence," as used in the statute quoted above, and similar ones. We do not lay any particular stress upon the fact that the mayor was not absent from the State, though in one of the cases cited the court seems to have done so. For example, the mayor of Lexington, if at Hickman, Ky., would be further removed from his city, and therefore less capable of being in touch with its governmental affairs, than if he were at Cincinnati. So the mayor of Newport or Covington, cities of the second class, also would be absent from the State, and, of course, from their respective cities, if across the river, in Cincinnati—a matter of 10 minutes' journey. It may be that the courts, until the Legislature has spoken more definitely as to its meaning upon this subject, might have to determine each case largely upon the particular facts presented. We think that the soundest reasoning, under the authorities cited and examined, gives the word "absence" the meaning of that absence which would make it impossible for the official to perform the act in question. Where the mayor is to preside personally at a meeting of a board of which he is *ex officio* a member, absence in that case would probably mean an absence from the place of meeting. But for the matter of making an appointment, signing a contract which he was permitted by law to sign for the city, or to issue a proclamation, or to issue a notice citing an official to appear for a violation of the statute, which he is authorized to try, the mayor might perform any of these acts though beyond the corporate limits of the city. Would the chairman of the board of aldermen be authorized, if the mayor should happen to go out to the water-works, near Lexington, and in which his city is interested,

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as it supplies its citizens with water necessary for their comfort, health and protection, to take advantage of such an absence to disarrange and confuse his policy of government? There can be but little doubt that he should not presume to act in a case of such absence, except the emergency was such as to demand that the official act be then done. In discussing a somewhat similar provision of law found in the Constitution of Louisiana, the supreme court of that State, in the case of *Louisiana v. Graham*, 26 La. Ann., 568, 21 Am. Rep., 551, had under consideration the meaning of the term "absence from the State," as used by the Constitution. In that case the governor had gone beyond the State lines, to Pass Christian, a few hours' run from the capital of Louisiana. Said the court: "How is the absence of the governor to be ascertained? It is manifest that there ought to be some certain proof, accessible to the public, from which they may with certainty derive the knowledge as to who is authorized to act as governor of the State. As the law makes no provision for the mode in which the governor shall manifest to the public his absence from the State, it necessarily is left to his discretion, subject to his responsibility to the people. If the interests of the State should suffer in consequence of his prolonged absence, he would be amenable to public sentiment and to the control of the impeaching power of the State. . . . We do not think that it was ever contemplated that the movements of the governor should be watched, with the view that the lieutenant governor, or speaker of the house of representatives, should slip into his seat the moment he stepped across the borders of the State." To the same effect, see *People v. Parker*, 3 Neb., 409; 19 Am. Rep., 634. To adopt a thought so forcibly presented in the last named case, when we reflect upon the

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possible consequences of such construction of the statute, and upon the disgraceful tricks, strifes and exhibitions which might be entailed upon the people of the community, we hesitate and cast about for a more salutary rule than to adopt the suggestion of appellee that the mere physical absence is the one contemplated—for one which, while it will insure the efficient administration of the affairs of the city government during the brief, temporary absence of the executive, will at the same time protect that department of the government against unnecessary and ill-advised intrusion. We have therefore concluded that the absence contemplated by the Legislature in the employment of that word in the section under discussion, is not merely a physical absence of the mayor from the city, but is such an absence as renders him incapable for the time being of performing the act that may be in question, which act must present such a necessity for immediate attention as to require it to be then executed. In the case at bar there was no such urgency, and no emergency apparent for the president of the board of aldermen to assume the duties of mayor. *Mayor of Detroit v. Moran* (Mich.), 9 N. W., 252; *Lynde v. Winnebago Co.*, 16 Wall., 6, 21 L. Ed., 272; *Attorney General v. Taggart* (N. H.), 29 Atl., 1027, 25 L. R. A., 613.

2. It is insisted for the plaintiff that the appointment of members of the board to fill vacancies must be confirmed by the board of aldermen as original appointments must be. It is argued (and this we conceive to be the main argument for the appellee in this behalf) that there is no apparent reason, and in fact none, why the Legislature should require the mayor's appointees, original and for full terms, always to be confirmed by the board of aldermen, and yet allow him to fill vacancies in the same board without such

confirmation. The argument seems to us to be almost irresistible when presented to that body who make the laws. But the consequences are not so much to be regarded, in the construction of the statutes, as the language employed, where the language is unambiguous. In fact, as long as the language of the statute is not ambiguous, the courts have no discretion as to the meaning they will give to it. Says Suth. Stat. Const., section 237: "It is, beyond question, the duty of courts, in construing statutes, to give effect to the intent of the lawmaking power, and seek for that intent in every legitimate way. But . . . first of all, in the words and language employed; and if the words are free from ambiguity and doubt, and express plainly, clearly, and distinctly the sense of the framers of the instrument, there is no occasion to resort to other means of interpretation. It is not allowable to interpret what has no need of interpretation." Any other course would be extremely mischievous and dangerous. It is not for the judiciary to make laws. If they should, under the guise of interpretation, give to plain, unambiguous language used by the Legislature in expressing its intention a meaning nowise warranted by the language employed, it would practically be to constitute the courts not only the construers of the law, but its makers. The meaning of the language of the section quoted is absolutely clear, is entirely free from ambiguity, is as plain and simple as any similar number of words in common use in the English language. We can find no warrant to hunt beyond their common, everyday use for a latent meaning supposedly in the minds of the Legislature. Furthermore, the statute (section 3108) expressly confers upon the mayor the power to fill all vacancies in office unless it was other-

wise provided in that act. We find no provision otherwise, nor can we see why the Legislature should confer the power upon the mayor to fill vacancies in more important positions than these are, without the confirmation of the board of aldermen, and yet require the confirmation in this particular instance. In any event, as to the wisdom or folly of such a provision, it is a matter beyond the control of the judiciary. A distinction is obviously intended to be made between original appointments of members of the board, and appointments to fill vacancies; otherwise there is no sense or meaning in the provision directing and authorizing the mayor to fill all vacancies. If the Legislature had intended that appointments to fill vacancies should be submitted for confirmation to the board of aldermen, it would doubtless have put in after the word "mayor," as it expressly did when providing for the original appointment, "subject to the approval of the board of aldermen."

Whether the injunction prayed for was or was not a proper incident of appellant's claim and suit, yet the facts stated in the petition were such as prevented a cause of action against appellee, and the demurrer thereto should have been overruled.

The judgment dismissing the petition is reversed, and cause remanded, with directions to overrule the demurrer, and for further proceedings not inconsistent herewith.

CASE 74—ACTION BY E. W. BLUE, &C. AGAINST R. M. WATERS FOR SPECIFIC PERFORMANCE OF A CONTRACT FOR THE SALE OF REAL ESTATE.—JAN. 30.

Blue and Others v. Waters.

APPEAL FROM JEFFERSON CIRCUIT COURT.

JUDGMENT FOR DEFENDANT AND PLAINTIFFS APPEAL.—REVERSED.

INFANTS—PARTITION OF REAL ESTATE—NOT PARTIES TO ORIGINAL ACTION—SUBSEQUENT APPROVAL.

Held: 1. Though under Civ. Code, section 499, infants are necessary parties in partition of real estate held jointly by them and others, yet, though they were not made parties, an adult, to whom part of the land was allotted, having instituted suit for special performance of her contract of sale to a third person, and they being made parties by cross-petition of the defendant, and their guardian having filed an answer, alleging that the partition was advantageous to them, the chancellor may in such suit, on proof that the partition was equal and just, approve of the partition.

OLIVER H. STRATTON AND J. B. McCORMICK, ATTORNEYS FOR APPELLANTS.

The questions to be considered by the court are:

1. Had the Louisville chancery court any jurisdiction to partition real estate at the suit of the executors of a decedent's estate?

2. Whether or not the heirs of Sarah B. Weller, to-wit, Bernard Weller Coldewey and Anton Weller Coldewey, were properly before the court?

3. Was the partition in said suit valid?

(1) It is shown that while John C. Weller and George P. Weller, as executors, had no interest in the real estate, they did, as heirs of Sarah B. Weller have an interest therein and were equally interested therein with all the other defendants, and I take it that where the executors are also heirs and devisees the court would have jurisdiction to partition the estate. At any rate, all the parties to this suit who were *sui juris*, having accepted said partition are now estopped to question it.

(2) While it is true that the infants were not regularly served with process, the record shows that they were repre-

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sented is said action by their father and guardian, W. G. Coldewey, and it is provided in section 499, Civil Code, subsection 2, that in suits for partition of real estate as to persons under disability, that a guardian may appear and defend for his ward, and,

3. In a subsequent proceeding, as is the case at bar, W. G. Coldewey, father and guardian of these children, being before the court by constructive process, and represented by a guardian *ad litem*, having filed his answer adopting the partition made in the old suit alleging that it was fair and just and to the interest of the infants, the division therein made should stand and thus avoid the expense of another division, especially, as in this case, where there is a large fund out of which the respective shares could be and were equalized.

AUTHORITIES QUOTED.

Sec. 2348, Kentucky Statutes; sec. 52, John D. Carroll's Civil Code; Webber v. Webber, 1 Met., 18; Lloyd v. McCauley, 14 B. Mon., 535; 80 Ky. Rep., 64; Beverly v. Perkins, 1 Duv., 251; Waters v. Chinn, 1 Met., 499; Hughey, &c. v. Sidwell's Heirs, 18 B. Mon., 261; Cheatham v. Whitman, 86 Ky., 614; Subsec. 4, sec. 83, Bullitt's Civ. -Code (last Rev. Ed.); Bouv. Law Dic., ed. of 1862, vol. 1, p. 50, title, accumulative judgments; sec. 1402, Kentucky Statutes; Hardin, 366; 3 Marshall, 381; 4 Mon., 370; 1 Marshall, 77; 3 Mon., 31; 5 Mon., 355; 6 Mass. R., 421; Tye v. Tye, MSS. Opin., Sep. 23, 1902, and Locknane v. Hoskins; Smith and Wife v. Payne, 2 Bush, 589 (Oct. 5, 1866) and the numerous cases cited for appellee in that case; 2 Sugden on Powers, 3-4-5-6-154-232, etc., sec. 391, Civ. Code, as to infant's right to show cause, &c., within twelve months after attaining twenty-one years of age. Allen v. Troutman, 10 Bush, 61; Park v. Bellenger, 10 R., 303.

C. H. SHEILD, ATTORNEY FOR APPELLEE.

In this action by Mrs. Blue and husband against Mrs. Waters, to enforce specific performance of a contract, the appellee, Mrs. Waters, believing that Mrs. Blue could not give her a marketable title, sets up three matters of defects in the title of Mrs. Blue to the property which she contracted to take.

1. That Mrs. Blue acquired her title by devise from her mother to a one-seventh undivided interest in the real estate of her deceased mother (the lot in question being part thereof), which was divided by a proceeding had in the Louisville chancery court in action No. 27995 of Sarah B. Weller's Executors v. Elizabeth Blue, &c., and that the court in a suit brought by said executors had no jurisdiction to make the division.

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2. Because the infant heirs of Sarah B. Weller, to-wit, Bernard Weller Coldewey and Anton Weller Coldewey were not parties to said suit and were never before the court in the *division suit*.

3. Because there being seven equal parts, the executors who were themselves equal owners with the other heirs, caused the real estate to be divided into five parts instead of *seven*, and took out of the personalty a sum equal to the value of the real estate allotted to the five, thus compelling these infant heirs to take in real estate more than they were entitled to, and to pay for such excess out of their proportion of the personal estate, thereby converting their personalty into realty which the court had no power to do. Authority relied on, *Wren v. Gibson*, 90 Ky., 189.

OPINION OF THE COURT BY CHIEF JUSTICE BURNAM—REVERSING.

We are asked in this appeal to pass upon the sufficiency of the title of appellant Elizabeth Weller Blue to two lots situated on Indiana avenue, in the city of Louisville, which were allotted to her in the division of the estate of her mother, Sarah Weller, and which she has contracted to sell to the appellee, Rebecca Maney Waters. Sarah B. Weller, by will, which was duly probated in the Jefferson county court on the 13th day of July, 1900, after making provision for the payment of her debts, devised all the rest of her estate of every kind and description to her seven children, George P. Weller, Laura A. Sullivan, Elizabeth W. Blue, Mary B. Coldewey, John C. Weller, W. L. Weller and R. L. Weller, equally. After the execution of the will, and before the death of Sarah B. Weller, her daughter Mary B. Coldewey died leaving surviving her husband, William Coldewey, and two sons, Bernard and Anton Weller Coldewey, who were infants under 14 years of age. Her sons John C. and George P. Weller were appointed executors of the will. On the 3d day of December, 1900, the executors instituted a suit in equity in the Jefferson circuit court, making the other children and W.

G. Coldewey, the father and statutory guardian of his infant children, defendants, in which they alleged that testatrix was at her death the owner of a number of separate parcels of real estate in the city of Louisville, which were specifically described, and the title to which at her death vested in her children and grandchildren as joint tenants; that after the payment of the debts there remained \$38,809.60 in their hands, the proceeds of the personal estate, and a mortgage note for \$2,750, and asked that the entire real property owned by the testatrix should be devised between the four adult defendants and the two infants; and that they should be permitted to retain in money their entire interest in the estate, and to this end asked the court to appoint three commissioners to value and divide the real estate among the defendants, and to report the sum required in cash to make the plaintiffs and defendants equal in the aggregate value of the estate received by them. The estate of the testatrix was divided in this proceeding in accordance with the prayer of the executors, the real estate and mortgage note being valued by the commissioner at \$29,750. The real estate allotted to Mrs. Sullivan was valued at \$6,300, and each of the other defendants, in addition to the real estate allotted to them, received in cash a sufficient amount to make their interest equal to the valuation placed on the realty allotted to Mrs. Sullivan. The infants, Anton W. and Bernard Coldewey, who were not made parties to the proceeding, received, in addition to certain specific real estate, \$450; the plaintiffs, John C. and S. P. Weller, were adjudged \$6,300 from the cash in their hands; and the balance of it was divided equally amongst the heirs. The lots in this controversy on Indiana avenue were allotted to E. W. Blue, who sold them to the appellee, Rebecca Maney Waters,

on the 3d day of March, 1902, and who refused to accept and pay for them. Appellants thereupon instituted this suit for the specific enforcement of the contract sale.

Appellee defended, on the ground that the infants, not being parties to the partition suit, were not divested by the judgment in that proceeding of their title to the lots, and made her answer a cross-petition against the infants and their statutory guardian, whom she alleged were non-residents of the State, and asked that a warning order be issued notifying them of the proceeding. W. G. Colde-
wey filed an answer as statutory guardian, in which he says that the interest of his wards was promoted by the allotment of the real estate to them instead of money, and asked that the partition made in the former proceeding be approved and confirmed. Upon final submission, the chancellor held that the title was not good, and dismissed her petition, and to reverse that judgment this appeal is prosecuted. The effect of the judgment in the partition suit was to invest a considerable proportion of the personal estate of the infants in realty.

Section 499 of the Civil Code reads as follows: "A person desiring a division of land held jointly with others or an allotment of dower, may file in the circuit court of the county in which the land, or a greater part thereof lies, a petition containing a description of the land and statement of those having an interest in it, and the amount of such interest, with prayer for the division and allotment, and thereupon all persons interested in the property, who have not united in the petition shall be summoned to answer on the first day of the next term of the court. (2) The statutory guardian of an infant, committee of a person of unsound mind, and husband of a married woman, may unite in the petition in the names of and in conjunc-

tion with such infant person of unsound mind, or married woman, and if the petition be against an infant, person of unsound mind, or married woman, the guardian, committee or husband, may appear and defend for them. If they fail to do so, the court shall appoint a discreet person for that purpose."

This section of the Code clearly contemplates that, in a suit for the partition of real estate held jointly by infants and adults, the infants shall be parties to the proceeding, either as plaintiffs or defendants, in order to divest them of title. As they were not parties to the original suit filed by the executors against the other heirs and their father and statutory guardian, the judgment of partition in that proceeding was ineffectual to pass their title to the real estate. But in this proceeding they were made defendants to the cross-petition of the defendant Waters, and are before the court by constructive service of process; and their father, as statutory guardian, has filed an answer in which he says that the partition of the real estate in the old suit was fair and advantageous to his wards, and that the investment of a part of their money in real estate was advantageous and beneficial to them. If this answer had been supplemented by other proof showing that the partition was fair and the investment of the money of the infants was judicious and advantageous to them, the chancellor would have been justified in approving the partition in the old suit. In the case of *Land Co. v. Elliott* (12 R., 812) (15 S. W., 518), it was held that whilst infants were necessary parties to an action for partition of land held by them as joint tenants, and that a judgment of partition in a suit to which they were not parties was erroneous, their statutory guardian, after they had been brought before the court, might in open court adopt the

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report if the partition was equal and just. We think that the necessary proof showing these facts can be made in this case without resorting to a new suit for that purpose.

For reasons indicated the judgment is reversed, and cause remanded for additional proceedings consistent with this opinion.

CASE 75—ACTION BY THOMAS R. HAY AGAINST THE CITY OF LEXINGTON FOR DAMAGES TO HIS HOUSE AND LOT BY RAISING THE STREET AND THEREBY THROWING WATER ON HIS PREMISES.—FEB. 3.

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APPEAL FROM FAYETTE CIRCUIT COURT.

JUDGMENT FOR DEFENDANT AND PLAINTIFF APPEALS. AFFIRMED.

LIMITATION—CHANGE OF STREET GRADE—ACTION FOR DAMAGES FROM SURFACE WATER.

Held: 1. The cause of action for damages to an abutting owner from a permanent improvement by the raising of the street grade, whereby the surface water from the pavement is thrown on his lot, accrues at the time of the change, so that the statute runs from that time.

FORMAN & FORMAN, FOR APPELLANTS.

POINTS AND CITATIONS.

1. The trial court erred in peremptorily instructing the jury at the conclusion of the testimony for plaintiff to find for the defendant.

2. It was error to overrule plaintiff's grounds and motion for a new trial.

These rulings are deemed erroneous, and should be reversed for these reasons:

(1) The petition alleges and the testimony shows that the injury complained of has been and is continuing in its nature; that the cause of it can be removed or remedied, and that appellant has sustained damage in the diminution of the rental value and in the rendering of the occupation of his property

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less comfortable and desirable, not only more than five years before the institution of his suit, but also *within five years* next before the bringing of his suit.

(2) The authorities establish the rule for cases of this sort, that where the injury is constantly recurring, and varies in accordance with the seasons, hence continuing in its nature, and the cause of it can be remedied or removed, and damage has been sustained by complainant within the statutory period, he may recover for the damage sustained within said period, even though his right of recovery for the *original wrong* and the damage resulting therefrom more than five years before the institution of his suit be barred by the statute of limitation. And this upon the eminently just principle that the continuance of a wrong can never any more make it right in law than in morals. *City of Louisville v. Coleburne*, 22 Ky. Law Rep., 64; *Staples v. Spring*, 10 Mass., 72; *McConnell v. Kibbe*, 29 Ill., 483; *Bowyer v. Crook*, 4 M. G. & S., 236; *Holmes v. Wilson*, 10 Ad. & El., 503; *Sullens v. Chicago, &c. R. R. Co.*, 7 Am. St. Rep., 501; *Van Orsdel v. Burlington, &c. R. R. Co.*, 56 Iowa, 470; *Note and Authorities*, 20 Am. St. Rep., 177; *Hunt v. Iowa Central R. R. Co.*, 41 Am. St. Rep., 473; *Wells v. New Haven, &c. Co.*, 21 Am. St. Rep., 421.

W. S. BRONSTON, CITY SOLICITOR, FOR APPELLEE.

Our contention in this case, is that by the principles of law already well established in the State of Kentucky, the owner in fee of a piece of property can not recover for an injury to same where the act which is alleged to have caused the injury, accrued more than five years before the institution of the action.

CASES CITED.

Ency. Pleading & Practice, vol. 13 p. 235; *Ency. Pleading & Practice*, vol. 13 p. 236; *City of Louisville v. Coleburn*, 22 Law Rep., 64; *Harrison v. Silver Springs*, (Tex. Civ. App., 896) 35 S. W., Rep. 744; *Jean v. Hennessee*, 69 Iowa, 373; *Phillips Code Pleading*, sec. 191; *Phillips' Code Pleading*, sec. 336; *West & Bro. v. I. C. & L. R. R. Co.*, 8 Bush, 409; *Louisville & Nash. R. R. Co. v. Orr*, 91 Ky., 109; *Elizabethtown, &c. R. R. Co. v. Price, &c.*, 11 Ky. Law Rep., 367; *City of Henderson v. Winstead*, 22 Ky. Law Rep., 828; *Leezer v. City of Louisville*, 7 Ky. Law Rep., 829; *Smith v. Tichmond*, 19 Cal., 477; *Sublett v. Tinney*, 9 Cal., 423; *Barringer v. Warden*, 12 Cal., 311; *Mason v. Cronise*, 20 Cal., 212; *Boyd v. Blackman*, 28 Cal., 19; *Palmtag v. Roadhouse*, 34 Pac. Rep., 111; *Bass v. Berry*, 51 Cal., 264; *Pleasants v. Samuels*, 114 Cal., 34; *Meyer v. Burk-*

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leman, 5 Colo., 262; Young v. Whlittenhall, 15 Kan., 579; Humphrey v. Carpenter, 39 Minn., 115; Edwards v. Bates Co., 55 Fed. Rep., (Mo.) 436; Smith v. Dean, 19 Mo., 63; Murphy v. Phelps, 12 Mont., 531; Combs v. Watson, 32 Ohio St., 228; Douglass v. Corry, 46 Ohio St., 349; Cotton v. Jones, 37 Tex., 34; Howell v. Howell, 15 Wis., 60; Tucker v. Lovejoy, 73 Wis., 66.

OPINION OF THE COURT BY JUDGE O'REAR—AFFIRMING.

The city of Lexington, in November, 1891, improved the roadway of North Broadway in front of the property of appellant, by the construction of a brick street. This improvement involved the alteration of the graded street, raising it slightly so as to leave the street and the sidewalk about 7½ inches above appellant's lot. This suit was brought in October, 1900, against the city, for damages resulting from the inconveniences caused appellant's tenants and the diminution of the rental value of his property by reason of the water being thrown onto his premises from the street, whereas before the change of the street it had been allowed to run down the street, and not onto appellant's lot. The evidence failed to show that the improvement complained of was in any wise negligent, or deficient in plan or execution. It further showed pretty conclusively that the improvement was a permanent one, as that term is used in this connection. The court, at the conclusion of appellant's evidence, directed peremptorily a verdict for the city.

This appeal involves alone the plea of limitation, appellee having interposed the plea of the five-year statute. At common law the judgment of the municipal governing body concerning the grading of its streets and the manner of its being done, so far as either was not negligent, was a matter within their discretion. Damages resulting from its proper exercise (that is, its exercise in the

absence of negligence) were not recoverable against the municipality. *Keasy v. City of Louisville*, 4 Dana, 154, 29 Am. Dec., 395; *Wolfe v. Railroad*, 15 B. Mon., 409; *Chapman v. Railroad Co.*, 10 Barb., 360. For its negligent execution of its plan of public improvements the city was, of course, liable to suit by the property owner injured thereby. Section 242 of the present Constitution provides that municipal and other corporations invested with the privilege of taking private property for public use shall make just compensation for the property taken, injured or destroyed by them. This section of the Constitution, as applicable to damage or injury done to abutting property by a regrading of a public street, was first under consideration by this court in *City of Henderson v. McClain*, 102 Ky., 402 (19 R., 1450) 43 S. W., 700, 39 L. R. A., 349). There the question was fully considered, and the court held that the municipality was liable under this section for damage done abutting property in regrading a street, although under the previous decisions of the court, including those cited above, it would not have been. This has been followed in *City of Mt. Sterling v. Jephson* (21 R., 1028) 53 S. W., 1046, and *Thoman v. City of Covington* (23 R., 117) 62 S. W., 721. But none of these cases dealt with the question of limitation. They merely determined the fact that the city was liable, whereas before the enactment of that section of the Constitution they could not have been. The nature of this liability is not changed from a tort by the section of the Constitution. It merely extends to the municipality a liability for an act which is essentially a tort, for which it had not before been subject.

For appellant it is contended that the act of the city in this instance constituted a continuing nuisance, which

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rendered the city liable for each recurrence of damage to the premises in question. Many authorities from other jurisdictions are cited in support of this argument wherein the question is interestingly discussed. In this State, however, it is settled that, where the injury done by a public improvement, permanent in its nature, is such as that the damages occasioned thereby are permanent, the recovery must be had for the entire damage in one action, and such damages accrue from the time the nuisance is first created, and from that time the statute of limitations begins to run. *Railroad Co. v. Combs*, 10 Bush, 382, 19 Am. Rep., 67; *Railroad Co. v. Orr*, 91 Ky., 109 (12 R., 756) 15 S. W., 8. Thus it appears that the city's wrong (its tort) is of that character for which it is liable, but the liability is an entirety, accrues upon the completion of the public work, and the damages therefor must be recovered in one action. The case of *City of Louisville v. Coleburne* (108 Ky., 420) (22 R., 64) 56 S. W., 681, is cited and relied on by appellant as settling a contrary rule. This case and others of the kind, such as *Railroad Co. v. Cornelius*, 111 Ky., 752 (20 R., 771) 64 S. W., 732, and *Finley v. City of Williamsburg* (decided January 16, 1903) 24 R., 1386, 71 S. W., 502, are not authority in point. In all of these cases it appeared that the improvements causing the damage had been negligently made, and were, therefore, susceptible of remedy by repairing the defects. It must be evident that, if a public improvement of this nature is negligently done, so that its imperfect condition causes an unusual accumulation or flow of water upon the adjacent premises, the remedy will lay more effectually in repairing the defective part, and allowing damages for the injury up to that time, than by attempting to fix upon the probable damages for all time, or in assessing

them from time to time. On the other hand, if the work is of a permanent character, and perfectly done, nothing in the way of its betterment that could remedy the evil complained of is possible or practicable. All that could be done in that way has already been done. If, then, the injury is caused, and must, from the nature of the situation, continue, it is obvious that the only remedy is to measure the damages that will compensate for the injury, and give them to the party aggrieved. It is also equally clear that it must be then apparent, when such work is completed, just what this damage is likely to be. It is, in such case, the diminished value of the property in money, caused by the act in question. *Railroad Co. v. Price*, 11 Ky. Law Rep., 367; *City of Henderson v. Winstead*, 109 Ky., 328 (22 R., 828) (58 S. W., 777). This entire damage is then a cause of action against the wrongdoer.

The doctrine underlying the cases of *Railroad Co. v. Cornelius*, *City of Louisville v. Coleburne*, and *Finley v. City of Williamsburg*, supra, is that a continuing nuisance caused by a negligent construction, being susceptible of remedy by repairing the defective premises, gives to the demandant a new cause of action for each successive injury; for it was the duty of the wrongdoer, as it was in his power, to remove the cause of the recurring injuries. His failure to do so was a new cause of the damage, and therefore a basis for a new right of action therefor at each occurrence. This distinction between the two classes of cases is clearly recognized in *Railroad Co. v. Orr*, supra.

While it is argued for the appellant that the injury in this case was such as might be remedied by a special system of drainage or sewage at that point, nothing appears in the record to show this fact. No witness testified to it; nor does it appear what the present system is. The rec-

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ord shows that the impairment of appellant's property is due to the fact that since the reconstruction of this street in 1891 the pavement has shed its surface water during rainy weather so that some part of it goes upon appellant's premises, damaging the walls and foundation of his houses, and making them undesirable as places of residence. This is an injury differing in degree only from any other inconvenience, annoyance, or impairment caused by such an improvement, which lessens the value of the property. It was not shown that it was practicable to provide at that point any different method of disposing of this natural and damaging incident from the one actually adopted. We are of opinion that the facts shown by appellant's evidence were such as to conclusively establish that the statute of limitation in favor of the city began to run in November, 1891, and the peremptory instruction was justified.

The judgment is affirmed.

Petition for rehearing by appellant overruled.

CASE 76—ACTION BY BARNEY CASSIDY AGAINST DAVID WILSON'S ASSIGNEE, AND WATSON ANDREWS AS ADMINISTRATOR AND INDIVIDUALLY FOR A SALE OF THE BANK BOOKS OF WILSON & COMPANY.
—FEB. 3.

Andrews and Others v. Wilson's Assignee.

APPEAL FROM FLEMING CIRCUIT COURT.

FROM THE JUDGMENT ANDREWS APPEALS. REVERSED.

ASSIGNMENT FOR CREDITORS—REVOCATION OF TRUST—DEATH OF ASSIGNOR—DISCHARGE OF ASSIGNEE—EFFECT—APPOINTMENT OF RECEIVER—SALE OF BANK BOOKS.

Held: 1. Neither death of one who makes an assignment for the benefit of creditors nor an order of the court discharging the assignees from further connection with the trust estate and releas-

Andrews and Others v. Willson's Assignee.

- ing their sureties from further liability revokes the trust, or deprives the creditors of any right they acquired by the assignment, but on petition of a creditor a receiver will be appointed to look after and apply assets which have not been collected.
2. The bank books of a banker who has made an assignment for creditors, and which are the evidence of the assets of the trust estate, should not themselves be sold.

JOSEPH H. POWER AND R. J. BABBITT, FOR APPELLANTS.

On February 1, 1896, David Willson, doing business as a private banker, made an assignment to Hart & Sousley for the benefit of his creditors. On March 1, a petition was filed by the assignees in the Fleming circuit court against Willson and his creditors for a sale and settlement of the assigned estate.

In January 1898, an order purporting to be a final judgment was entered in the case for a distribution of the proceeds of the estate, and discharging the assignees and releasing them from any farther liability, and at the April term, 1899, the following judgment was entered: "All matters in controversy herein having been fully settled, the assignees are now discharged and they and their sureties are now relieved from any further liability herein on their bond as such assignees or otherwise, and this cause is filed away."

In September, 1901, Cassidy filed this suit in said court reciting that the assignees had been discharged by the judgment of April, 1899, and alleging that they still had the books of the assigned estate in their possession, that the same were assets subject to the claims of the creditors and were worth \$175, and sought to attach and have them sold for his exclusive benefit, he being a creditor of the assigned estate. Watson Andrews was made a party and it was alleged that he had a part of these books in his possession, the assignor, Willson, having died in the summer of 1901 and said Andrews had qualified as his administrator.

Andrews filed answer and cross-petition against the assignees alleging that the estate owed him individually \$1,500, that the assignees had wasted the estate, made fraudulent compromises, grossly neglected their duties, and having been discharged as assignees, they had no further right to the books or any of the property of the estate not disposed of, and asking that a receiver be appointed to take charge of the books and residue of the estate and sell same and distribute the proceeds to the creditors. The assignees, Hart & Sousley filed a demurrer to the petition of Cassidy attaching the books which was sustained by the court, and also filed demurrer to the cross-petition

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of Andrews which was also sustained, and from these judgments sustaining said demurrers this appeal is prosecuted.

We contend that the assignees and their sureties having by the judgment of the court been discharged from said trust, they have no further interest in or control of the books or any of the assets belonging to said estate, and that it was the duty of the court to have ordered the books and all other property belonging to said estate into the hands of the administrator of Wilson or into the hands of a receiver. Perry on Trusts, sec. 921; Burrill on Assignments, pp. 568-576 and cases cited therein.

W. G. DEARING, G. A. CASSIDY, B. S. GRANNIS AND JOHN P. MCCARTNEY, FOR APPELLEES.

1. Our contention is that Watson Andrews, as administrator of David Wilson, deceased, has no right to any property of said decedent, and if there is any property yet remaining belonging to the trust estate of Wilson it should of necessity be disposed of under the orders of the Fleming circuit court in the action filed by the assignees to settle the estate of said Wilson.

2. That the trust having once been created could not fail for lack of the trustees, and the trust would be carried on either by the present trustees or such other trustees as the court may appoint.

3. The demurrer was properly sustained to the cross-petition of Andrews, because he was a party to the original suit by the trustees and had an opportunity to then raise the question arising in this case, and failing then to do so, can not do so now.

4. The books of the bank are the memoranda of the assignees in the adjustment of the accounts of the bank, and the only evidence of the status of the accounts passed on by them in the settlement of the estate, and, if sold, the assignees would have no data for their own protection.

AUTHORITIES CITED.

Gardner &c. v. Letcher, Assignee, 16 R., 779; Am. & Eng. Ency. of Law, vol. 27, 320; Grimes v. French, 13 Rep., 398; Dobyns v. Dobyns, 79 Ky., 98; Kentucky Statutes, sec. 96; Civil Code, secs. 436, 438.

OPINION OF THE COURT BY CHIEF JUSTICE BURNAM—REVERSING.

In February, 1896, David Wilson, doing business as a private banker under the name of the Exchange Bank of David Wilson & Co., at Flemingsburg, Ky., made a gen-

eral deed of assignment of all of his property to the appellees, R. K. Hart and J. H. Sousley, for the benefit of all of his creditors equally. The assigned estate was settled in a proceeding instituted by the assignees in the Fleming circuit court in March, 1896, to which all the creditors were made parties, and received 10 per cent. of their respective demands, which was paid to them under an order of the court. At the April term, 1901, of the Fleming circuit court, the following judgment was entered in the proceeding: "All the matters in controversy herein having been fully settled, the assignees are now discharged, and they and their sureties are now relieved from any further liability herein on their bond as such assignees or otherwise, and the cause is filed away." In September, 1901, Barney Cassidy instituted a suit in the Fleming circuit court against the assignee, Hart and Sousley, and Watson Andrews as administrator of David Wilson, who died pending the litigation, and Watson Andrews as an individual, in which he set out all the foregoing facts and alleged that he was a creditor of Wilson, that Andrews as administrator of David Wilson had taken possession of the books of Wilson belonging to the bank, which he alleged were of the value of \$175, and sought to have them sold for his exclusive benefit. Andrews, as administrator of Wilson and in his individual capacity, filed an answer, which he made a cross-petition against Hart and Sousley, in which he alleged, in substance, that he was a creditor of David Wilson, deceased; that he had qualified as his administrator; that the assignee had been discharged by a judgment of the Fleming circuit court as assignees and released from further liability as such; admitted that the books sought to be attached showed claims due the estate of Wilson in excess of the valuation placed thereon by

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plaintiff, which had not been collected by the assignees previous to their discharge; and claimed that as administrator of David Wilson he was entitled to hold the books and collect the unadministered assets shown thereon for the benefit of his creditors. And in the third paragraph of his answer he alleged that, in the event the court should be of opinion that he was not entitled to the possession of these books in his capacity as administrator of Wilson, he was interested in the collection of the indebtedness due as shown by the books as a creditor; that the assignees, Hart and Sousley, had grossly neglected their duties, had made fraudulent and improvident compromises, wasted the assigned estate, and had been discharged from any further connection therewith by a judgment of the Fleming circuit court in the proceeding *supra*; denied their right to further administer the trust or hold possession of the books; and asked that a receiver be appointed to wind up the trust; and that he be allowed to prosecute and defend for all the creditors of David Wilson, who were too numerous to be brought before the court; and that the books, consisting of ledgers, memorandum books, cash books, and all other property belonging to the assigned estate not administered by the assignees, should be turned over to the receiver, who should hold the books and any moneys realized therefrom for the benefit of all the creditors of Wilson.

General demurrers were filed by the assignees to the petition of Barney Cassidy, and they also filed general demurrers to each paragraph of the cross-petition of Andrews, all of which were sustained by the trial court and the existing attachment discharged, and a judgment entered that Hart and Sousley, as assignees of David Wilson, were entitled to the possession of all the books and

memorandum belonging to the bank and the assigned estate, and that they should be delivered to them; and Andrews has appealed.

The deed of assignment of Wilson vested all of his interest in the assigned property in the assignees for the benefit of his creditors; and his death did not have the effect of revoking the trust thus created so long as there remained any debts due by him at the date of his assignment, nor to deprive his creditors of any right which they acquired by the deed of assignment. See *Gardner v. Letcher*, 16 R., 778, 29 S. W., 868, and *West v. Gribben*, 23 R., 311, 62 S. W., 869. Nor did the order of the Fleming circuit court discharging the assignees from all further connection with the trust estate and releasing their securities from all further liability in connection therewith have this effect. Equity will not allow a trust to fail for want of a trustee, nor can there be any doubt that a trustee may be discharged from further connection with the trust by a court of competent jurisdiction, and a new trustee or receiver appointed to administer the trust, either upon his own application or that of a creditor or party having pecuniary interest in the trust estate. See *Burrill, Assignm.* (3d Ed.), section 469. It seems to us that the necessary effect of the judgment of April, 1901, was to create a vacancy in the position of assignee. Appellant does not seek in this proceeding to surcharge or falsify any former settlement made by the assignees. All he asks is that the court by proper orders will appoint a receiver to look after assets which he alleges have not been collected, and apply them equally for the benefit of all the creditors. Upon the averments of the cross-petition he was entitled to the relief sought. But it would not be proper to decree a sale of the bank books themselves. They are the

evidence of the assets of the trust estate, which belong alike to all the creditors, and which should be preserved for their inspection upon proper application and at proper time.

For reasons indicated, we think the chancellor erred in sustaining a demurrer to the third paragraph of the appellant's (Watson Andrew's) cross-petition, and adjudging the former assignees entitled to the absolute custody and control of the bank books and papers of the assigned estate. The judgment is therefore reversed, and cause remanded for proceedings consistent with this opinion.

CASE 77—ACTION BY E. J. SECREST FOR A MANDATORY INJUNCTION AGAINST F. B. HENRY AND OTHERS TO COMPEL THEM TO OPEN THE BALLOT BOXES FROM CERTAIN PRECINCTS AND COUNT THE BALLOTS CAST IN A PRIMARY ELECTION FOR COUNTY ASSESSOR.—FEB. 3.

114	677
611	701
114	677
120	686
114	677
121	284

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APPEAL FROM NICHOLAS CIRCUIT COURT.

FROM A JUDGMENT GRANTING THE WRIT OF INJUNCTION, DEFENDANTS APPEAL. REVERSED.

PRIMARY ELECTIONS—BALLOTS—RECOUNTING—NOTICE OF CONTEST—MANDAMUS—PETITION.

- Held: 1. Kentucky Statutes, section 1563, provides that in all cases of contest the governing authority of a political party holding a primary election shall have power to hear and determine the same in such manner as the committee shall determine. HELD, that a written notice from a candidate to the committee that he proposed making a contest, where no contest had in fact been made, was not sufficient to require the committee to recount the ballots.
2. Where a petition for a mandatory injunction to compel a committee of a political party to recount the ballots at primary election, averred that plaintiff, who was a defeated candidate, after notice to the committee, had demanded such recount; that he

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believed it would show that he had received a plurality of the votes; and that the committee refused his written request therefor, or to make any arrangement for deciding the contest which he proposed to make; but failed to allege any fraud, wrongdoing, or mistake on the part of the committee or any of the officers of the election,—it was demurrable.

DICKSON & KENNEDY, FOR APPELLANT.

At a primary election held in Nicholas county, May 4, 1901, to nominate Democratic candidates for the November election following, the appellee, Secrest, was one of the candidates for county assessor. The returns made by the precinct election officers showed that Cummins received 322 votes, Secrest 316, and Arnold 312, and upon this showing Cummins was declared the nominee by the committee.

In the meantime appellee appeared by counsel, before the committee had taken any steps towards counting the vote or declaring the nominee, and moved that the committee should produce the ballot boxes and count the ballots and in that way ascertain the result and also moved the committee to provide a form and manner for contesting the nomination—but no notice of contest was given by appellee then or afterwards. Appellee thereafter had a written notice served on each member of the committee requiring them to reassemble, open the ballot boxes, and count the vote, and provide a form of contest. The committee having performed their duty as they understood it, and no contest having been inaugurated, refused to meet or take any further action in the matter, and on May 27, 1901, appellee filed his petition in the circuit court against the committee and other candidates, asking for a writ of mandamus to compel the committee to reassemble and count the ballots, which, upon final hearing of the court, was granted and from that judgment appellants have prosecuted this appeal. We contend:

1. That the petition does not state facts sufficient to constitute a cause of action.
2. That the committee did all the law required it to do when it met and counted the votes as certified by the election officers.
3. That the committee had no authority to open the boxes and count the ballots where the certificate of the election officers show how the vote was cast.
4. Under the primary election law the committee, so far as counting the vote is concerned, is vested with the same power as an examining board in regular elections—that is to canvass the returns as made and certified by the precinct officers and to issue certificates of nomination to the successful candidates.

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5. No contest having been filed the committee was not required to provide a form and manner of contest.

6. The petition does not state any facts upon which the committee could act, but it merely states conclusions.

7. The petition does not allege that plaintiff received any votes that were not counted for him nor that any votes were counted for his opponent to which he was not entitled, nor that any act was done by which his rights were prejudiced.

AUTHORITIES CITED.

Kentucky Statutes, secs. 1560, 1482, 1508, 1562 and 1563; Anderson v. Likens, 20 Ky. Law Rep., 1001; Booe County Judge v. Kenner, 20 Ky. Law Rep., 1343; Louisville v. Keen, 13 B. M., 17; Bach v. Spencer, 24 Ky. Law Rep., 354.

CHAS. W. WOOD, FOR APPELLEE.

There are only two points in this case:

1. Whether or not it was the duty of the governing authority to count the votes, or whether that duty was merely to canvass the returns made by the precinct officers?

2. Whether or not it was the duty of the Democratic committee to provide a manner and form for contesting elections?

(1) We contend that section 1563 of the primary election law which empowers the committee to "*count the votes*" received by all the candidates in such primary instead of using the words "*canvass the vote*," means that the committee when called on must *count* the vote, and not merely canvass the returns of the precinct election officers.

(2) Section 1563 provides that in "cases of a tie vote or contest, the proceedings shall be in such form and manner as the committee or governing authority shall determine upon."

This the committee failed to do, and also failed and refused to *count* the vote and we claim that the writ of mandamus was the proper proceeding to compel the committee to act.

AUTHORITIES CITED.

Civil Code, sec. 477; 82 Ky., 632; 18 B. M., 426; 3 Met., 394.

OPINION OF THE COURT BY JUDGE SETTLE—REVERSING.

On May 4, 1901, a primary election for the nomination of Democratic candidates for county offices was held in Nicholas county by order of the Democratic committee. Appellee, E. J. Secrest, and six others were candidates in the primary for the nomination of county assessor. The race

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was quite close between the candidates for assessor, for appellee was defeated by only six votes by the candidate declared the nominee. The primary seems to have been fairly and legally conducted. Returns were duly made from the several voting precincts of the county, and on May 6th the committee met at the courthouse in Carlisle, the county seat, and in due form canvassed all the returns, and declared the candidates receiving the highest number of votes duly nominated. Appellee was present at the meeting of the committee mentioned, and demanded of them that they open the ballot boxes returned from the several precincts, and count the ballots, in order that it might be determined whether he or his leading opponent was entitled to the nomination for the office of county assessor. The committee refused to comply with his request, and thereupon appellee instituted suit in the Nicholas circuit court against appellant Henry and others, chairman and members of the Democratic committee, respectively, for the purpose of obtaining a mandatory injunction from the judge thereof to compel the county committee to open the ballot boxes and make a count of the votes from the ballots cast and returned. The petition avers, in substance, that the appellee had, after notice to the committee, demanded of them a count of the ballots, and the opening by them of the ballot boxes for that purpose; that he believed that a count of the ballots would show that he had received a plurality of the votes cast in said primary for the nomination as assessor. It was alleged that the committee refused his request to count the ballots, and, further, that, though requested, and in writing notified, by him to do so, they refused to make or arrange the form or manner of deciding the contest which he proposed to make for the nomination of assessor. Appellants filed special demurrer to the petition and to the juris-

diction of the court, which was overruled. They then entered motion to require appellee to paragraph his petition, make it more specific, and to strike out certain parts thereof; all of which motions were overruled. Thereupon a general demurrer to the petition was filed and overruled, after which answer was filed. The answer traverses the petition, denies the jurisdiction of the court, and avers, in substance, that no contest had been instituted by appellee, and that none was then pending; that the vote had been fairly canvassed and counted by the committee from the returns made by the election officers of the various precincts of the county; that the count thus made showed the nomination of a person other than appellee for assessor; and that they had no right to open the ballot boxes and count the vote from the ballots. A demurrer was filed to the answer by appellee, which was sustained, and, appellants refusing to plead further, the lower court granted the mandatory injunction to compel the committee to open the ballot boxes and count the ballots. To that judgment appellants excepted, and to reverse it they prosecute this appeal.

The petition contains no averment of fraud, wrongdoing, or mistake on the part of the committee or any of the officers of the election. It does not set forth any ground for a contest. It gives no reason to support appellee's claim to the nomination, but merely expresses his opinion that the counting of the ballots contained in the boxes would show him entitled to the nomination. Section 1563, Kentucky Statutes, provides that: "In all cases of a tie or contest, the committee or governing authority of the political party holding such primary election, shall have the power to hear and determine such contest, and decide who shall be entitled to the nomination. The proceedings in such cases shall be in such form and manner as the committee

shall determine upon." We are not inclined to believe that a mere statement, though in the form of a written notice, from a candidate, made to the committee, that he proposed making a contest, would be sufficient to justify the latter in prescribing the form or manner of proceeding in such contest, when, after all, it might or might not be made; and certainly the committee could not be required, in the absence of a contest, to open the ballot boxes and count the ballots. If appellee intended to inaugurate a contest, he should have done so in the usual and only proper manner—by giving notice to the committee, as well as to the candidate whose right to the nomination was to be contested, and by filing with the committee specifications showing fully the grounds upon which the contest was to be based. If for irregularities, fraud, or mistake in the manner of holding the election, receiving votes, counting votes, or certifying the returns, it should be stated. In the absence of such specifications, the committee were justified in refusing the appellee's demands.

We are also of the opinion that the special judge erred in not sustaining the general demurrer to the petition. It presents no cause of action, and the court had no authority to grant the injunction in the absence of a contest, and upon the mere suggestion of appellee that he believed a count of the ballots would show his nomination, especially when the facts alleged in the petition show that a count had been properly made by the committee by a canvass of the returns.

Judgment reversed, with directions to the lower court to dissolve the injunction and dismiss the petition.

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CASE 78—THREE ACTIONS HEARD TOGETHER INVOLVING THE LIABILITY OF THE VARIOUS PARTIES ON CERTAIN NOTES INCLUDING USURIOUS INTEREST AND QUESTIONS OF EVIDENCE, &c.—FEB. 3.

Alexander v. First National Bank of Harrodsburg, &c.

Same v. Same.

Same v. Mercer Nat. Bank of Harrodsburg.

APPEAL FROM MERCER CIRCUIT COURT.

FROM THE JUDGMENTS EDGAR ALEXANDER INDIVIDUALLY AND AS ADMINISTRATOR OF ARTIE ALEXANDER APPEALS. REVERSED AS TO THE FIRST NATIONAL BANK AND AFFIRMED AS TO THE MERCER NATIONAL BANK.

USURY—EVIDENCE—STATEMENT OF DECEDENT—RENEWAL NOTES.

- Held: 1. Where plaintiffs suing on notes are entitled at a certain term of court to judgment by default, or that the issues be made up by answer, payment of a stipulated sum, which was six per cent. interest on the principal, to secure time for preparing the defense, is not a payment of usury.
2. Though a note bears interest at a usurious rate, yet a payment made, being less than legal interest for the time covered on the debt, does not contain usury.
3. In a suit against a bank by E. for a penalty for receiving usury from him it is not competent for the bank's president to testify that a deceased person told him half the payments were furnished by her.
4. Testimony of a bank's president, in an action against it by E. for a penalty for receiving usury from him, that a deceased person told him she furnished half the payments, even if competent, is insufficient to overcome the testimony of E. that he actually paid the interest at the rate of eight per cent., and the admission of the president that he received such sum, and that it was paid as interest.
5. Where, a year after death of T., who had given a note to a bank with E. and A. sureties on it, it appeared that his estate was insolvent, and capable of paying only seventy per cent. of his debts, if real estate of his be sold at a certain price, and it was agreed by all that E. should buy the real estate, and the bank should loan him enough to pay seventy per cent. of T.'s indebted-

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edness, and the additional thirty per cent. of his indebtedness to it, and this was done, and E. and A. gave this note to it for the loan, such note was not a renewal of the first note, so as to allow usury in the first note to be taken advantage of in an action on the second note.

GAITHER & VANARSDALL, FOR APPELLANTS.

Appellants complain of the judgment herein:

1. Because of the dismissal of the petition against First National Bank.
2. Because it does not adjudge a recovery for double the amount of all of his claims against the Mercer National Bank.
3. Because it treats the transaction of April 23, 1895, as a novation.
4. Because it renders the estate of Artie Wilson liable for the debts.
5. Because it directs a sale of the land to satisfy the judgments rendered against appellant, Edgar Alexander, &c.
6. Because it allows interest on appellee's debts from the date of filing their petition and cross-petition.

(1) Our contention is that the forfeiture as to the First National Bank should extend to the note for \$6,728.09 dated September 13, 1893, due in ninety days, and that judgment should have been rendered for this sum, only leaving out the sum of \$3,024.74 of accumulated usurious interest by renewals.

(2) The Mercer National Bank note was calculated upon an amount which contained over \$500 of usurious interest, and under the statute authorizing such recovery we think Alexander was entitled to judgment for double the amount represented in this claim.

(3) It is contended that the interest paid October 26, 1898, even if usurious was paid in consideration of a continuance of a suit and therefore can not be recovered. We contend that the agreement shows that these sums were paid as interest upon the debts of plaintiff and defendant, Mercer National Bank, and that the calculation though at six per cent. was made upon amounts containing about \$4,000 usury and that the transaction was therefore usurious.

(4) The judgment against Artie Alexander's administrator is erroneous because there is no affidavit supporting the claim of either bank as required by law.

We think the facts in this case show conclusively that the transactions of April 23, 1895, were all made in view of a settlement of T. F. Alexander's estate and that the obligations

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assumed by Edgar and his sister constituted a mere continuance of an obligation already existing and should not be treated as a novation.

AUTHORITIES CITED.

Taul v. Sears, 11 Ky. Law Rep., 366; Stucky, assignee, v. Brown & Co., 11 Ky. Law Rep., 404; Worthly v. Hammond, 13 Bush, 510; Hill v. Cornwall, 16 Ky. Law Rep., 106; Rudd v. Anderson, 12 Ky. Law Rep., 489; Snyder v. Mt. Sterling Bank, 15 Ky. Law Rep., 4; Usher's Exr. v. Flood, 12 Ky. Law Rep., 721.

T. H. HARDIN, ATTORNEY FOR FIRST NATIONAL BANK OF HARRODSBURG.

We claim that the record shows that the loan as made to Edgar Alexander and Artie Alexander by the First National Bank on April 23, 1895, of \$8,502.20, and note that day given for \$8,347.94 due in six months after date, was a new, independent and separate transaction; that Edgar Alexander can not go back of that date for usury against the bank; that by law Artie Alexander as administrator of T. F. Alexander can not renew a note; that when a note is assigned without recourse in law or equity, that is the end of it.

2. That Edgar Alexander can not be relied on as a witness.

3. That the payment of the \$438.97 made by Ed. Alexander on October 25, 1898, was for time and indulgence.

4. He who seeks equity must do equity. Edgar Alexander obtained more in the lower court than he was entitled to. He has had the use of T. F. Alexander's 220 acres, Artie Alexander's eighty acres and his own 200 acres since April, 1895, and we ask that the judgment be affirmed.

AUTHORITIES CITED.

On questions of novation or new note on 23 April, 1895. See Morse v. Wilcox, 17 Law Rep., pp. 19 and 30.

2. On weight of testimony, see Humphrey & Co. v. Brown's Administrator, Law Rep., vol. 23, No. 1, pp. 26 and 27.

3. On questions as to time, interest should commence, see Second National Bank of Richmond v. Fitzpatrick, Law Rep., vol. 23, No. 7, p. 610, also, Citizen's National Bank of Danville v. Forman's Assignee, Law Rep., 22, vol. 23, No. 7, p. 613.

4. On questions of affidavit and demand as to Artie Alexander, deceased. See Cockrill & Co. v. Mize, 11 Law Rep., p. 637; Gay v. Marshall, 12 Law Rep., p. 103; Huffman v. Moore's Administrator, 19 Law Rep., p. 461; Tipton v. Richardson, 21 Law Reporter, p. 1195.

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W. LAWSON SIMRALL, FOR APPELLEE, MERCER NATIONAL BANK OF HARRODSBURG, Ky.

PROPOSITIONS AND AUTHORITIES.

1. A national bank that charges usury in violation of U. S. Rev. St. section 5198, forfeits the entire interest the note carries with it, but in an action on the note, the bank is entitled to recover the original principal debt with interest from the commencement of the suit. *Brown v. Marion National Bank*, 169 U. S., 416; *Second National Bank v. Fitzpatrick*, 23 R.

2. As such forfeiture extends only to the interest that an existing note (which embraces every note of which the note in suit is proximately or ultimately a renewal) carries with it, or which has been agreed to be paid thereon, it does not extend to such interest as may have been carried with, or agreed to be paid on, a note already cancelled, or extinguished, as

(a) By payment. U. S. Rev. Stat., secs. 5197, 5198; Story on Prom. Notes, 2d ed., sec. 372; *Brown v. Marion National Bank*, 92 Ky., 607; *Hendrick v. Lindsay*, 93 U. S., 143.

(b) By novation. 2 Bouv. Law Dict., "Novation, 241; Story on Prom. Notes, 2d ed., secs. 438 and 63; 16 A. & E. Ency. L. 1st ed., 862 and 876 and note; 11 A. & Eng. Ency. L., 2d ed., 914 and note, 932 and 973; *Studebaker Mfg. Co. v. Montgomery*, 74 Mo., 101; *Hoagland v. Farmers' and Mechanics' Bank*, 7 Fed. Rep., 159; *Hyde v. Booraem*, 16 Peters, 167 at p. 178; *Smith v. Young*, 11 Bush, 393; *Webb on Usury*, sec. 452; *Lyman v. Bank U. S.*, 12 How. (U. S.) 239, p. 243; *Spencer v. Society of Shakers*, 23 R.; *Culver v. Wilbern*, 48 Iowa, 26; *Morse v. Wilcoxson*, 17 R., 29; *Brown v. Marion National Bank*, 92 Ky., 607 and 18 R., 136. Distinguishing. *Snyder v. Mt. Sterling National Bank*, 94 Ky., 231; *Hill v. Cornwall*, 95 Ky., 512; *Rudd v. Anderson*, 12 R., 489.

3. Such forfeiture will not be declared unless the party seeking it make convincing proof of every fact essential to forfeiture. *Wheeler v. Union National Bank*, 96 U. S., 268.

4. A doubt whether usury has been taken will be resolved in favor of the bank. *Timberlake v. First National Bank*, 43 Fed. Rep., 231.

5. There can be no recovery under U. S. Stat., sec. 5198 of the penalty of twice the amount of interest paid within two years unless it constitutes usury. *Ruffner v. Hogg*, 1 Black, U. S., 115; *Brown v. Marion National Bank*, 169 U. S., 416; 27 A. & E. Ency. L., 1st ed., 922 note, and 1043; *Webb on Usury*, sec. 416; *New Jersey, &c. Co. v. Turner*, 14 N. J. Eq., 326; *Graeme v. Adams*, 23 Grat (Va.) 225; 1 Bouv. Law Dict., p. 598; *Eddy's Exr. v. Northrup*, 15 R., 434.

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6. It is essential to recovery of such penalty that it should affirmatively appear that usury was knowingly received by the bank. *Wheeler v. Union National Bank*, 96 U. S., 268.

7. If there be a doubt whether a transaction is usurious the doubt must be resolved in favor of its validity. *Timberlake v. First National Bank*, 43 Fed. Rep., 231.

8. Verification and demand of a claim against the estate of a decedent equally imperative under Kentucky Statutes, section 3872, are equally unnecessary, where an action begun against the decedent in his lifetime is, after his death revived against his personal representative. In such a case the statute does not apply. *Kentucky Statutes*, secs. 3870, 3872; *Tipton's Admr. v. Richardson*, 21 R., 1195; *Huffman v. Moore's Admr.*, 19 R., 462. Overruling, *Worthley v. Hammond*, 13 Bush, 510; *Stucky, Assignee v. Brown and 11 R.*, 404; *Taul v. Sears*, 11 R., 366.

9. But even if verification and demand, or verification alone, were originally necessary, they, one and both, were waived.

(a) By failure to make the objection in the court below. *Shire's Admr. v. Johnson*, 18 R., 853.

(b) By completion of the issues and trial had upon the merits, without making the objection. *Gray v. Marshall*, 12 R., 103; *Tipton's Admr. v. Richardson*, 21 R., 1195.

OPINION OF THE COURT BY CHIEF JUSTICE BURNAM, REVERSING
AS TO FIRST NATIONAL BANK AND AFFIRMING AS TO MERCER NATIONAL BANK.

This appeal is from a judgment of the Mercer circuit court rendered in three cases, which were consolidated and heard together. A summary statement of the facts out of which the litigation grew is necessary for the proper understanding of the questions of law which we are asked to decide. On the 9th day of July, 1893, T. F. Alexander executed a note to the First National Bank of Harrodsburg for \$2,000, due on the 12th of January, 1894, which the appellants Edgar Alexander and his sister, Artie Alexander, signed as his securities. On the 13th of September, 1893, he executed his note to the same bank, with the same securities, due on the 16th of December, 1893, for \$6,728.09. This latter note was taken up by the execution of a 30-day note by the same parties for \$6,777.42, and which matured on the

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19th day of January, 1894. At this latter date, T. F. Alexander executed his note to the bank for \$8,768.34, due seven months after date, with his brother, Edgar Alexander, and his sister, Artie Alexander, and James L. Bond as securities. The proceeds of this note were applied to pay off the balance due upon the \$2,000 note, dated on the 9th of July, 1893, and the \$6,777.45 note, dated the 16th of December, 1893. All these various notes bore interest at the rate of 8 per cent., and the accumulated interest was added to the principal at the date of each renewal. On the 6th day of April, 1894, Thomas F. Alexander executed his note to the Mercer National Bank for \$4,368.25, due six months after date, with Artie Alexander, Edgar Alexander and James L. Bond as his securities. The net proceeds of this note—\$4,200—was put to the credit of T. F. Alexander, a discount of \$168.25 being reserved as interest at the rate of 8 per cent. Thomas F. Alexander died intestate on the 15th of April, 1894, before the maturity of either of the debts to the banks, and his sister and security, Artie Alexander, qualified as his administratrix. It was developed after his death that his estate was insolvent, and his heirs at law, with a view of facilitating the settlement of his estate, and saving his sister, Artie Alexander, from loss, so far as possible, because of the various liabilities incurred by her as surety for her brother, sold and conveyed to her in fee all their interest in his estate, real and personal. His realty consisted of a tract of land in Mercer county, containing 220 acres. It was ascertained prior to the 23d of April, 1895, that, after reducing to cash all the available personal estate of decedent and selling the 220 acres of land belonging to T. F. Alexander for \$40 per acre, his estate would pay 70 per cent. of his debts, and on that day a consultation was had between the administratrix, Artie Alexander, and the

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appellant, Edgar Alexander, and their attorney, on one side, and the officers of the First National Bank and the Mercer National Bank, their principal creditors, at which it was agreed that the appellant, Edgar Alexander, should purchase the 220 acres of land at \$40 an acre, amounting to \$8,800, and that the two banks would loan him enough money to pay 70 per cent. of the indebtedness of T. F. Alexander, and also a sufficient sum to pay the overplus of his indebtedness, which would fall upon Edgar Alexander and his sister, Artie. To carry out this agreement, the First National Bank loaned to Edgar Alexander on that day \$8,507.36, on which interest was charged at the rate of 8 per cent., and a note was taken therefor, due six months after date, for \$8,847.95, and the Mercer National Bank on the same day advanced to him \$4,195.45, taking a note therefor, due six months after date, for \$4,366.22, on which interest was charged at the rate of 8 per cent. Seventy per cent. of this money was paid over to Artie Alexander, administratrix, by Edgar Alexander, and was by her applied to the indebtedness of T. F. Alexander. The balance of the money was used by Edgar Alexander to pay the overplus due the respective banks by his sister and himself as securities thereon. To secure the payment of this note so executed to the banks, Edgar Alexander and his sister, Artie Alexander, executed a mortgage on several tracts of land, including that which had formerly belonged to the estate of Thomas F. Alexander. The note to the First National Bank was renewed on the 26th day of October, 1895, by Edgar and Artie Alexander by the execution of a new note for \$9,201.82, due on the 29th of April, 1896, interest being added at the rate of 8 per cent., and was again renewed by the execution of a note for \$9,569.89, due six months after

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date. On the 1st of November, 1896, this note was renewed by the execution of a note for \$9,752.83, due six months after date. On the 4th day of May, 1897, this note was renewed by the execution of a new note for \$9,752.83, due six months after date. At this time Edgar Alexander paid to the bank \$390.12, as interest at the rate of 8 per cent., by his check on the Boyle National Bank, and on the 7th of November, 1897, this note was renewed by the execution of a new note to the bank for the same amount, due six months after date, interest on this note at the rate of 8 per cent., being paid to the bank by the check of Edgar Alexander on the Boyle National Bank for \$390.12. On the 3d of September, 1898, the appellee, the First National Bank of Harrodsburg, instituted this suit, asking a personal judgment on the last renewal of their debt and for an enforcement of the mortgage lien executed to them on the 23d of April, 1895, jointly with the Mercer National Bank. The Mercer National Bank was made a defendant, and on the same day filed its answer, which was made a cross-petition against its codefendants Artie and Edgar Alexander, in which they set up their note dated November 9, 1897, for \$4,721, which they allege was a renewal of the note executed on the 23d of April, 1895, and ask a personal judgment against Edgar and Artie Alexander, and joined in the prayer for an enforcement of the mortgage. The defendants were not prepared to file their answers to the petition and cross-petition at the following October term of court, and, in consideration of the continuance of the cause to the next term of the court, which began in February, 1899, and an extension of time to file their answer until the fourth day of that term, they paid to the banks interest on the notes sued on to February 10, 1899, at the rate of 6 per cent. The amount paid to the First National Bank under this agree-

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ment was \$438.87 and to the Mercer National Bank \$211.14. In January, 1899, before the expiration of the time given to the defendants to answer, Artie Alexander died, and shortly after her death the codefendant Edgar Alexander qualified as her administrator, and the action was, by consent, revived against him as administrator.

The answer of appellants to the petition of the First National Bank denies the amount of its claim, and in the second paragraph alleges that the obligation sued on carried with it a large amount of usurious interest, and they ask the forfeiture of the entire interest from the date of the first note executed by T. F. Alexander to the bank, under sections 5197, 5198, Rev. St. U. S. [U. S. Comp. St., 1901, p. 3493]. A similar answer was filed to the cross petition of the Mercer National Bank. And while this suit was pending the appellant Edgar Alexander, on the 20th of January, 1899, filed a separate suit against each of the banks, in which he sought to recover double the amount of interest paid on his indebtedness to them within two years prior to the institution of the suits. His petition against the First National covers the following alleged payments of interest on the debt sued on:

To amount paid as interest at 8 per cent., May	
25, 1897	\$ 390 11
To amount paid as interest at 8 per cent., Dec.	
27, 1897.....	390 12
To amount paid October 26, 1898.....	438 87
<hr/>	
Total	\$1,219 10

The claim against the Mercer National Bank on this score is as follows:

To amount paid as interest May 27, 1897, at 8	
per cent.....	\$109 89

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To amount paid December 24, 1897.....	\$190 23
To amount paid October 26, 1898.....	211 14
Total	\$517 28

The issues were made up in the three cases, and they were consolidated, and the proof taken in the consolidated actions, and final judgment rendered in all the cases in February, 1901. The suit of Edgar Alexander against the First National Bank was dismissed. In his suit against the Mercer National Bank he was given a judgment for \$376.46, being double the amount paid as interest on the 24th of December, 1897. In the suit of the banks against Edgar Alexander they were given judgment for the amount loaned by them on the 23d day of April, 1895, without interest prior to the institution of their respective suits, and a decree of foreclosure directing the sale of the mortgaged lands entered. From that judgment Edgar Alexander and Edgar Alexander, administrator of Artie Alexander, deceased, have appealed.

He insists that under the proof he is entitled to a judgment against the First National Bank for \$2,830.20, double the amount of interest paid within two years from the institution of his suit; also that he was not given a judgment against the Mercer National Bank for the full amount sued for. And in the case of the banks against him he complains that the judgments did not give him a credit for all the interest which accrued upon the original loans of T. F. Alexander to the banks prior to the execution of the notes by him and his sister on the 23d of April, 1895. Nearly all the questions of law involved upon this appeal have been passed upon by this court in the recent cases of *Bank v. Fitzpatrick*, 111 Ky., 228 (23 R., 610) 63 S. W., 459, and *Bank v. Forman's Assignee*, 111 Ky., 206 (23 R., 613) 63

S. W., 454, 757. It will, therefore, only be necessary for us to apply the law as determined in these cases to the facts as developed by the proof in these consolidated actions. We will first consider the questions involved in the suit by Alexander against the two banks to recover double the amount of interest paid. The money paid to the banks by the appellant on October 26, 1898, can in no sense be regarded as a payment of usury. Appellees were entitled at that term of the court to a judgment by default for their respective demands, or that the issues should be made up by answer. To prevent this, and secure time for the preparation of their defense, appellants paid a stipulated sum, which was in fact 6 per cent. interest upon the principal of the respective debts sued on. Courts will not permit agreements of this character, made in good faith, to become the basis of a claim for double the amount so paid as a penalty under the statute, and, in our opinion, the trial court properly refused to so treat these payments. The \$109.89 paid to the Mercer National Bank on the 27th of May, 1897, was less than interest at the rate of 6 per cent. for the time covered upon the debt, and consequently did not contain usury for which a suit can be maintained under the statute.

We will not consider the claim of appellant for double the amount of interest paid to the First National Bank. He testifies unequivocally that on the 25th of May and 27th of December, 1897, at the dates of the renewal of his debt in the bank, he actually paid the interest thereon at the rate of 8 per cent. by checks drawn on the Boyle National Bank, and these checks are filed as exhibits with his deposition. The president of the bank admits the receipt of these two sums of money, and that they were paid as interest; but seeks to escape liability under the statute on the ground that

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Artie Alexander in her lifetime informed him that she was jointly bound for the obligation sued on with the appellant Edgar Alexander; that she furnished to Edgar Alexander one-half the money which went to make up the respective checks. It was not competent for the appellee's president to testify to oral statement made to him by Artie Alexander after her death as to what proportion of these payments were furnished by her; and, even if competent, it is not enough to outweigh the testimony on this point in favor of the appellant. We are, therefore, of the opinion that the appellant, Alexander, was entitled to a judgment in his suit against the First National Bank for twice the amount of these payments, which amounts to \$1,560.44, and that their note against him should have been credited with this sum as of the date of the institution of the suit.

We now come to appellant's claim to have the obligations due the banks purged of all the interest which accumulated during the lifetime of T. F. Alexander on his debts to them. This contention is made upon the theory that the obligations executed on the 23d of April, 1895, by Edgar and Artie Alexander were mere renewals of the existing indebtedness of T. F. Alexander, deceased, to the banks as of that date. Appellees, on the other hand, insisted that the transaction of that date resulted in the total extinguishment of the indebtedness of T. F. Alexander, and the loan to appellant was a new transaction. The evidence of every witness who has testified as to what took place between the parties on that day, except the appellant Edgar Alexander, is to the effect that it was the intention of all parties that the indebtedness of T. F. Alexander should be paid, and his estate finally settled. He had been dead more than a year, and his creditors were importunate for the payment of their respective debts. It was made manifest that his estate was

insolvent, and that his unsecured creditors would only realize 70 per cent. of their indebtedness if the estate was settled out of court in the most economical way. It was, therefore, agreed that appellant should take the land of T. F. Alexander at \$40 per acre. The personal estate had already been reduced to cash, and it was easy to determine what the estate would pay. To save the cost of a settlement in court, the sale to Edgar Alexander was agreed to; and to enable him to pay for the land, and to consummate the agreement with the creditors, the appellee banks consented to loan him a sufficient sum of money to make the deal successful. They surrendered as of that date their old obligation on which James L. Bond was bound as security, they gave up all claim against the estate of T. F. Alexander, and loan the money solely upon the credit of appellant and his sister, with the mortgage upon their lands including that purchased from the estate of T. F. Alexander. We think that there can be no doubt that on the 23d of April, 1895, the administrator of T. F. Alexander could have, under the federal statute, required the banks to accept the principal of the indebtedness of T. F. Alexander in payment of their debt; and that, after payment, they might have maintained a suit for double penalty. But, having elected to pursue a different course, they can not at this late day, in this transaction, be permitted to treat the obligation sued on as mere renewals by the security of the debts due the banks by T. F. Alexander. We therefore conclude that the chancellor properly denied appellants this relief.

For reasons indicated, the judgments in the cases of Edgar Alexander v. First National Bank and First National bank v. Edgar Alexander *et al.* are reversed. The cases of Edgar Alexander v. Mercer National Bank and the Mercer National Bank v. Edgar Alexander on cross-petition

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are affirmed, and the several causes remanded to the trial court for proceedings not inconsistent with this opinion.

Petition for rehearing by First National Bank of Harrodsburg overruled.

CASE 79—ACTION BY JOHN F. MURPHY AGAINST THE B. & O. S. W. R. R. COMPANY TO RECOVER DAMAGES FOR PERSONAL INJURY.—
FEB. 3.

Murphy v. Baltimore & Ohio S.-W. R. R. Co.

APPEAL FROM JEFFERSON CIRCUIT COURT.

JUDGMENT FOR DEFENDANT AND PLAINTIFF APPEALS. REVERSED.

RAILROADS—INJURY TO SERVANT—DEFECTIVE COUPLING—CONTRIBUTORY NEGLIGENCE—PEREMPTORY INSTRUCTIONS.

Held: 1. Plaintiff, a brakeman, was directed to couple certain cars equipped with a Buckeye automatic coupler, which, when in good condition, is operated by the brakeman, standing outside the track, by a lever running across the end of the car. The coupler in question was broken, to the knowledge of the railroad company's servants, but its condition was not ascertained by plaintiff until he attempted to use it, when it was necessary to raise the pin by hand. The train was about twenty-five feet away, backing down the grade; and, after discovering the condition of the coupler, plaintiff placed one foot inside the rail, raised the iron pin, in which position his arm was caught and crushed. Behind the car which was coupled were other cars, which were being loaded with live stock, on which persons were working; and, if the coupling had not been made, such persons and stock might have been injured, and plaintiff testified that it was partly to prevent this that he attempted to make the coupling. HELD, that plaintiff was not guilty of contributory negligence, as matter of law, sufficient to preclude his recovery.

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GEORGE WEISSINGER SMITH, ATTORNEY FOR APPELLANT.

O'NEAL & O'NEAL, OF COUNSEL.

CLASSIFICATION OF QUESTIONS OF LAW.

1. Even if a brakeman discovers danger, where the whole transaction is the occurrence of a moment, he is not to be held responsible if he errs as to the estimate of danger that confronts him. Defective Coupler; *Goodrich v. N. Y. Cent. R. R.*, 22 N. F., p. 397. Climbing ladder. No lantern: *Fox v. Chicago, St. P. R. R.*, 17 L. R. A., 289.

2. The case at bar is analogous to that where, in the discharge of a public duty, a person knowing danger, faces it to protect another and is injured by the negligence of some third person, who created the danger. *Am. & Eng. Ency. of Law*, 2d ed., vol. 7, p. 396.

GIBSON, MARSHALL & GIBSON, FOR APPELLEE.

POINTS RELIED UPON AND AUTHORITIES.

1. When an experienced brakeman is ordered to make a coupling of two cars, one stationary and the other subject entirely to his control, having two methods of performing the act of coupling them, one a proper and perfectly safe way, the other an improper and exceedingly dangerous way, he is required by law to accept the safe method; and if he voluntarily chooses the improper and dangerous method, knowing it to be improper and dangerous, he is guilty of such contributory negligence as will preclude him from recovering damages from his employer for injuries sustained by reason of such contributory negligence.

2. The fact that a brakeman freely and voluntarily selects an unsafe and improper manner of performing his duty in preference to a proper and perfectly safe manner, in the absence of some urgent reason or necessity for choosing the unsafe way, can not be held to be such an emergency as will excuse him from exercising that degree of care for his own safety which ordinary persons usually exercise for their safety. *Morris v. Duluth, &c., Ry. Co.*, 108 Fed., 747; *Gleason v. Detroit, &c., Ry. Co.*, 73 Fed., 647; *Penna. R. R. Co. v. O'Shaughnessy*, 41 *Am. & Eng. R. R. Cas.*, 479; *Memphis, &c., R. R. Co. v. Graham*, 53 *Am. & Eng. R. R. Cas.*, 396; *Ferguson v. Iowa, &c., R. R. Co.*, 5 *Am. & Eng. R. R. Cas.*, 614; *McCain v. Chicago, &c., R. R. Co.*, 76 Fed., 125; *Gowen v. Harley*, 56 Fed., 973; *Kansas, &c., Co. v. Reid*, 85 Fed., 914; *Brown's Admx v. L. H. & St. L. Ry. Co.*, 23 Ky., *Law Rep.*, 1504.

Murphy v. Baltimore & O. S. W. R. R. Co.

OPINION OF THE COURT BY JUDGE SETTLE—REVERSING.

The appellant, John F. Murphy, while in the service of the appellee, Baltimore & Ohio Southwestern Railroad, as a brakeman upon one of its freight trains, in attempting to make a coupling had his arm caught between two cars, wounding and mangling it to such an extent as to require amputation between the elbow and shoulder. The petition alleges, in substance, that his injuries were caused by the negligence of the appellee in providing a defective engine for pulling its train of cars, and in failing to provide a good and sufficient coupler for one of the two cars which he was attempting to couple; that is, that the coupler on one of the cars was defective, and the chain belonging thereto broken, which defect made it dangerous for use. It is further averred in the petition that the defective condition of the coupler was known to appellee, but unknown to appellant, at the time of the injury. The answer denies the negligence complained of in the petition, and pleads contributory negligence on the part of appellant, which is denied by the reply. Upon the conclusion of appellant's evidence, the jury, under a peremptory instruction from the special judge, found for appellee; and, appellant's motion and grounds for a new trial having been overruled, he prosecutes this appeal.

No effort was made in the trial court to show that the engine was defective, but appellant sought a recovery upon the sole ground that the coupler was defective and dangerous. The coupler complained of was what is known as a "Buckeye Automatic Coupler," which, when in good condition, is operated by a rod running across the end of the car, at right angles to the track. On the end of the rod a lever or crank is attached. A brakeman standing outside of the track may pull the lever, and thereby move the rod,

which in turn draws a chain attached to an iron pin, which is raised by the use of the lever, and when so raised the only remaining duty is to open the knuckles on a plane with the earth's surface. If the coupler is in order, all this may be done in a moment, and the stationary car is thus made ready to automatically grasp the approaching car. It is manifest, therefore, that when the Buckeye coupler is in good order there can be little or no danger to the brakeman in making the coupling. Although the answer denies that the coupler was in a defective condition, in the brief of counsel for appellee it seems to be admitted that it was in fact defective, in that the chain attached to the pin was broken, and besides it is overwhelmingly shown by the evidence introduced in the court below that such was its condition. The proof also conduces to show that when in this defective condition the only practical way to make the coupler do its work is to insert the arm between the bumpers, take hold of the pin with the thumb and fingers, and lift it up, and at the same time pull the knuckles out with the hand; and it is further shown that, while attempting to operate the coupler in this way, appellant's arm was caught between the irons of the two cars when they came in contact. It is, we think, also conclusively shown by the evidence that the defective condition of the coupler was known, or by the use of ordinary care could have been known, to appellee's agents and servants whose duty it was to give attention to such things, some time before appellant's injuries were received. Upon the other hand, the evidence also shows that its condition was not known to the appellant until in the act of making the coupling. The coupling was done at Flora, Ill., under the following circumstances: At that point the conductor desired to take in its train some loaded cars standing on the side track. These cars were

stationed behind a flat car loaded with lumber. By order of the conductor, appellant opened the switch and signaled the engineer to back the engine, to which was attached one freight car. The engine and car slowly backed down the grade, while appellant ran ahead, and he reached the lumber car when the backing train was about 25 feet away. He kept outside of the rails, and, when he reached the lumber car, pulled the lever out. As the chain was broken, the effort failed, of course, to draw the pin. This was the first warning that he received of the broken condition of the coupler. By this time the backing train had gotten in about 12 or 14 feet of him. It appears that about 20 feet behind the lumber car were two cars wholly or partly loaded with live stock, with one or more persons on them or at them, loading the stock. This fact was known to appellant, who doubtless also knew that if he failed to make the coupling the lumber car would probably be driven down grade against the cars upon which were the men and stock, by the collision with the backing train. Upon discovering the condition of the coupler, appellant placed one foot inside the rail, reached over the dead irons, and with his hand opened the knuckles and raised the iron pin, and in this position his arm was caught by the colliding cars and crushed as stated.

The lower court, in granting the peremptory instruction, seems to have proceeded upon the idea, not that appellant was guilty of negligence in the manner of operating the defective coupler, but that his injury resulted from his negligence in failing to get out of the way of the approaching train after he discovered that the coupler would not work by the action of the lever; and this conclusion seems to have been reached because of an answer made by appellant to a question upon cross-examination, to the effect that he might have stepped back after the discovery of the defect in the

coupler before the cars met. We do not agree with this conclusion of the trial court, for, in our opinion, the question of whether the appellant was or not negligent should not be made to depend altogether upon whether it would have been possible for him to have escaped by stepping back from between the cars after he discovered the defect in the coupler, but whether, in the emergency presented, confronted as he was with the necessity for immediate action, and knowing of the danger to himself from attempting to make the coupling, and of the danger of injury to the men and stock in the cars a few feet beyond him from his failing to do so, he acted with ordinary care in the performance of his duty. On this point appellant testified as follows: "The whole thing didn't consume but a few seconds, the engine and cars were moving down on me, and I was trying to get the coupling open, because I was on the down-hill side, and I knew the gentlemen below were loading the stock on the two stock cars to go with us; and a man braking as long as I had been (9 or 10 years) didn't want to miss a coupling. , Q. What would have been the consequence of doing nothing? A. I was trying to do that because if I missed the coupling the cars would roll on down onto the stock cars, and cripple some one. A person has to look out for that. Q. Was that part of your duty? A. Yes, sir." It must be borne in mind in this connection that the entire transaction consumed, as appellant stated, "but a few seconds." At the time he went in to adjust the coupler, the backing car had gotten within 10 or 12 feet of him. The cars were moving very slowly—not faster than two miles an hour. It can not be said that, in reaching over the irons with his hand to open the knuckles or to release the iron pin, appellant was guilty of negligence, for, according to the evidence this was the only way to open the

coupler in its defective condition; and, besides, he doubtless believed that the coupler could be thus prepared for performing its office in time for him to avoid the backing train, if it continued the same slow movement until it got to the car to which it was to be coupled. But according to the evidence, when the backing train was only four or six feet off it gave a sudden lurch, as if something had let loose, thus attaining an increase of motion, which in all probability could not reasonably have been anticipated by appellant at the time he took hold of the coupler; and, but for this increased movement of the train, it may, without violence to the evidence, be assumed that he could have adjusted the defective coupler, and stepped back from between the cars before they came in contact, and thereby have escaped injury. So we think that in view of such an emergency as that in which the evidence shows appellant was required to act, with little time for thought or reflection, and having in view, as he doubtless did, the danger that threatened the men and stock in the cars beyond him, and the danger to himself as well, the lower court erred in assuming that appellant was negligent in failing to step back from between the cars. The jury, under proper instructions from the court, should have been allowed to determine from the evidence whether he was or not guilty of negligence in attempting the coupling, and, if so, whether such negligence contributed to his injuries to such an extent that but for same they would not have been received. We find in *Goodrich v. Railroad Co.* (N. Y.), 22 N. E., 397, 5 L. R. A., 750, 15 Am. St. Rep., 410, a case not altogether unlike the one at bar. Goodrich, who was a brakeman, in attempting to couple some cars got his hand crushed. The train was slowly backing at the time, and when the cars to be coupled were in a few feet of each other, he stepped be-

tween them for the purpose of inserting the link in the bumper or drawhead of the stationary car. When the cars were three or four feet apart he discovered that the bumper of the moving car was lower than the bumper of the stationary car. He testified that he thought that, by raising the link, it would enter the bumper of the stationary car, but found that it would not do so, and his hand was caught in the effort to raise the link. In discussing the cause of the accident, the court of appeals of New York said: "The defective bumper was thus shown to have been the proximate cause of the accident. It was literally the *causa causans*. Its immediate effect was to permit the dead-woods of the two cars to come together, and the plaintiff was from that cause exposed to a danger not within the ordinary risks of his employment. This result was traceable directly to the defendant's failure to provide the moving car with bumpers in good order, and, unless the proof showed (which it did not) that plaintiff himself was in some way responsible for the condition of the car, the negligence of the defendant was established. The question as to the plaintiff's contributory negligence was, I think, one of fact for the jury. . . . He appears to have thought that the coupling could be made with the straight link that was in the drawhead. He had the right to assume that fact, and that the coupling appliances were in good order. It was only at the moment that the cars were about to collide that he discovered his error. The court can not affirm that for such an error of judgment, induced, as it was, to some extent, by defendant's neglect, he is to be held to have been careless. Under such circumstances, when the whole transaction is the occurrence of a moment, a man is not to be held responsible if he errs as to the estimate of danger that confronts him. If he acts the part of a prudent

man, willing to and intending to perform the duty to which he has been assigned, he has done all that the law demands of him, and whether he acted such a part under the circumstances of this case was for the jury to determine." The supreme court of Iowa, in *Fox v. Railroad Co.*, 53 N. W., 259, 17 L. R. A., 289, in discussing the question of whether a brakeman was guilty of contributory negligence in attempting to climb a car to set a brake when the train was in motion, in doing which he fell and his foot was crushed, said: "It is contended that the plaintiff can not recover, on account of the dangerous speed of the train, because he testified that he knew of its speed before he caught hold of the ladder. But he was required to mount the car. It is true, he might have refused to have done so, because it was running too fast, or because his lantern was out, or because when he approached the car he discovered that the ground sloped away from the track, so that he could not readily seize the ladder and place his foot on the stirrup. But he was acting under orders, and in an emergency which gave no time for reflection, and the jury might well find, as they did, that he was not chargeable with contributory negligence." We find nothing in the foregoing authorities that conflicts with any rule of law announced by this court in respect to cases of this character, and an examination of the authorities cited by counsel for appellee will, we think, show that none of them discusses the law in regard to the sudden discovery of dangerous defects, or the duty of a brakeman, in an emergency such as confronted appellant, to protect property or the lives of others thereby imperiled. With reference to the danger that might and doubtless would have resulted to the stock and stockmen near appellant in the event he failed to effect the coupling of the cars, we find the rule thus stated in 7 Am. & Eng. Ency. Law (2d

Ed.), sections 2, 3, p. 396; "He whose duty it is to care for the safety of others may do so, even though his duty leads him into great and visible danger, and not be chargeable with contributory negligence. But the injured person must not have created the danger, or been guilty of negligence from the consequence of which he tried to save others, or his recovery will be barred; and it must appear that he was in the discharge of duty, and could by the exercise of ordinary care have performed his whole duty, and yet escaped the danger." The rule stated is manifestly sound in principle and consonant with reason, and by it the conduct of appellant on the occasion of receiving his injuries should be measured.

We find no error in the rulings of the lower court in excluding certain questions and answers in the depositions excepted to.

For the reasons herein indicated, the judgment of the lower court is reversed, and the case remanded, with directions to set aside the verdict and judgment and grant appellant a new trial.

Petition for rehearing by appellee overruled.

Atchison v. City of Owensboro.

CASE 80—ACTION BY J. D. ATCHISON, CITY ATTORNEY, AGAINST THE CITY OF OWENSBORO FOR SERVICES RENDERED.—FEB. 4.

Atchison v. City of Owensboro.

APPEAL FROM DAVIESS CIRCUIT COURT.

FROM A JUDGMENT FOR PLAINTIFF FOR ONLY A PORTION OF HIS CLAIM HE APPEALS. AFFIRMED.

CITY ATTORNEY—COMPENSATION—VOLUNTARY SERVICE AFTER TERM EXPIRED.

- Held: 1. Under Kentucky Statutes, section 3314, providing that a city attorney shall be paid an adequate annual salary, and, in addition, "ten per cent. on all sums recovered and collected by him for the city," where an action was brought against the city to enjoin the collection of a tax, which action was successfully defended through the State courts by the city attorney, and judgment entered and affirmed on appeal for a penalty against the plaintiff in such action, such attorney was entitled to ten per cent. on the amount of such penalty, but not on the amount of the tax.
2. Where an action against a city, successfully defended by the city attorney through the State courts, was appealed to the supreme court of the United States, and, after such attorney's term had expired, he, without the request of the city, went to Washington, and assisted his successor in the case, the city was not liable to him for his expenses so incurred, or for such services.
3. Where a city attorney recovered a money judgment for the city in the county and State supreme courts, the fact that collection was delayed, until after his term expired, by an appeal to the supreme court of the United States, with *supersedeas* bond, did not deprive him of his right to ten per cent. of the amount so recovered.

C. S. WALKER & L. P. LITTLE, FOR APPELLANT.

SYNOPSIS.

1. As city attorney of appellee, Owensboro, Ky., a city of the third class, appellant's compensation was the annual salary, \$600, fixed by ordinance, "and ten per cent. upon all sums re-

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covered and collected by him for the city." Kentucky Statutes, sec. 3314.

2. "Recovered," as used in the statute, means "the restoration of a former right, by the solemn judgment of a court of justice," or to be successful in a suit. Bouvier's Law Dictionary; Black's Law Dictionary, 20 Am. & Eng. Ency. of Law, (1st ed.) 604 and notes; Powell v. Powell, 84 Va., 415; Oxford v. Paris, 33 Me., 180; Leslie v. York, 23 Ky. Law Rep., 2076.

3. Appellee, Owensboro, recovered, in each of the actions, upon the dissolution of the injunction therein in the Daviess circuit court, which was a final judgment, and "the restoration of a former right," and the *supersedeas* operated only to stay proceedings on the judgment, and did not, in any way, affect its validity. Civil Code, secs. 747 and 752; Davis v. Connelly, 104 Ky., 89; King v. Tilford, 100 Ky., 565.

These decisions were rendered since the amendment, in 1894, to Civil Code, section 747. Those previous to said date are not in point except in that they are in accord with the later ones in determining that an affirmance of a judgment dissolving an injunction and dismissing a petition relates back to, and takes effect at, the date it was rendered by the court of original jurisdiction, as in this instance the Daviess circuit court. Elizabethtown, &c. R. R. Co. v. Ashland, &c. St. Ry. Co., 94 Ky., 481; Smith v. Western Union Telegraph Co., 83 Ky., 274.

4. The provisions in the statute in regard to the compensation of the city attorney for a city of the first, second, fourth and fifth class, and for a town of the sixth class, (Kentucky Statutes, secs. 2909, 3366, 3167, 3509, 3649, 3685), are explicit that every city and town of each of said classes, in the State, shall pay its attorney a stated, fixed salary in remuneration for all services rendered, or work performed, by him as such attorney. The only variance is in the case of an attorney for a city of the third class, where he is to be paid an annual salary, "the same to be fixed by ordinance before his election" and, "in addition . . . ten per cent. upon all sums recovered and collected by him for the city." (Kentucky Statutes, secs. 3313 and 3314.) This difference or variance is not in spirit or intention, but in the interpolation of words only.

The statute is one, although embodied in several acts passed, at different times, in pursuance to section 156 of the Constitution, and these acts are *in pari materia*, and are to be construed together, "as forming a united system," and the legislative intent, in a particular instance, is to be gathered from

them as a whole. *State v. Gerhardt*, (145 Ind., 439), 33 L. R. A., 322.

It is clear the Legislature did not intend to make the compensation of the attorney for a city of the third class, as to the ten per cent., depend upon his personally collecting the amount recovered; but, rather, intended that he should be entitled to it, as a part of his remuneration, for his services in obtaining a recovery which is collectible, or collected by the city.

5. The word, "collected," in the statute (Kentucky Statutes, sec. 3314) was carelessly used for and means "collectible," and the latter should be substituted for the former in its construction. *Bird v. Board of Cmrs.*, 95 Ky., 195, 198 and 199; *Thornton v. McGrath*, 1 Duv., 351 and 352; *City v. Com.*, 9 Dana, 70; *Com. v. Delaware Division Canal Co.*, (123 Pa., 594), 2 L. R. A., 798; *People v. Bloomington Trops. Highway Comrs.*, (130 Ill., 482), 6 L. R. A., 161; *Suburban Light & P. Co. v. Boston*, (153 Mass., 200), 10 L. R. A., 497; *Board v. Maysville, &c. R. R. Co.*, 97 Ky., 151 and 152; *Douglass v. Cline*, 12 Bush, 649.

6. "Collected" and "collectible" are sometimes used in a statute, as in the present instance, interchangeably (*City v. Com.*, 9 Dana, 70), while "recovered" imports that "what was obtained by the suit," shall be "collected." *Leslie v. York*, 23 Ky. Law Rep., 2076.

It follows that the words, "and collected," in the statute, are redundant and meaningless, or else are used in the sense of "and collectible."

7. The construction of the statute for which we contend is the one given to it by appellee city, through its council, when appellant was appointed its city attorney, and it has ever acted, and paid its attorney, in every similar case involving this statute, accordingly. And this has been the case with every city of the third class in the State involved in litigation of the same nature with banks.

This contemporaneous construction is "a safe interpreter, and ought not to be overruled without cogent reasons" and in every instance, "the will of the Legislature, and not the words used by it, must control." *Barbour v. City of Louisville*, 83 Ky., 102 and 103.

8. Of this construction, which is not purely private, but connected with, or involved in, a matter of public nature, or is or should be generally known in the court's jurisdiction, judicial notice will be taken, although inquiries on the subject may be necessary on account of the judge's lack of information. *Wood v. Lee*, 5 Mon., 65; *Bell v. Barnett*, 2 J. J. Marshall,

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520; *Davern v. Bridgeford & Co.*, 13 Ky. Law Rep., 971; 17 Am. & Eng. Ency of Law (2d ed.) 895 and note; *Hoyt v. Russell*, 117 U. S., 404 and 405.

9. The provisions in regard to the collection of taxes in cities of the third class (Kentucky Statutes, secs. 3389, 3390, 3391, 3396, 3397, 3398 and 3399) are, in substance, the same as those relating to cities of the first class (Kentucky Statutes, sec. 2998, *et seq.*), while the council in the former are expressly denied the power to release or extinguish, "in whole or in part" any indebtedness or liability (Kentucky Statutes, sec. 3277), which is the same as the constitutional provision. Con. sec. 52.

It follows that the compromise made by appellee city was without authority and of no effect. *City of Louisville v. Louisville Ry. Co.*, 23 Ky. Law Rep., 390.

10. Appellant, as attorney for appellee city, entered its appearance, and was its attorney of record, in the supreme court of the United States, and is clearly entitled to the docket, or taxed attorney's fees, therein.

11. Appellant was authorized and directed by appellee city to perform the services rendered by him in the supreme court of the United States, and there was no revocation thereof, and it, also, acquiesced and obtained the benefits of them, and will not be permitted to refuse to pay the necessary expenses incurred in its behalf on this account.

The facts are averred in the petition, and it was error to sustain a demurrer to them.

Moreover, these cases having been committed to appellant to practice in the supreme court of the United States, it was his right and duty to argue them as ordered by said court, and, in legal contemplation, he continued in office for this purpose, which was all left to be done. This seems certain in the absence of an express prohibition, or discharge of him as its attorney, in which event he would be entitled to recover the value of his services to the time of his dismissal.

12. Appellant ought to recover, in any view that may be taken, the value of his services as fixed by the statute, or as much as they deserve or merit.

13. "Where the services to be performed are professional or private, rather than public or official," as in the present case, "an employment for a fixed time, at a fixed sum," is a contract, which can not be impaired by the city. 1 Dillon on Mun. Corp., (4th ed.) sec. 232.

The ten per cent., a fixed sum on the taxes, was an essential part of the compensation, and the right thereto vested in appellant, which can not be impaired.

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The decision in *City of Louisville v. Louisville Ry. Co.*, 23 Ky. Law Rep., 390, by implication at least, sustains this position.

14. The cross-appeal can not be maintained because: (1) The amount involved is only \$111.88. Kentucky Statutes, sec. 950; *Cannon v. Edwards*, 6 Ky. Law Rep., 734; *Licking Rolling Mill Co. v. Fisher*, 88 Ky., 176. (2) The judgment appealed from is wholly distinct from the judgment involved in the cross-appeal, and, in no way, influenced or controlled by it. *Brown v. Vancleave*, 86 Ky., 381. (3) There was no motion made, or grounds filed, for a new trial in the court below.

15. The petition avers facts sufficient to show that appellant was entitled to the judgment sought to be reversed on cross-appeal, which are not put in issue.

GEORGE W. JOLLY, CITY ATTORNEY, FOR APPELLEE.

The case in a nutshell is simply this: The banks instituted actions in equity against the city of Owensboro and its tax collector, for the purpose of perpetually enjoining the collection of franchise taxes assessed by the State board, and certified to the county clerk and by him to the city tax collector. An injunction *pendente lite* was obtained and collection of the taxes stayed until final hearing. The city answered but set up no counter claim or cross-petition. On final hearing in the circuit court, the petitions of the banks were all dismissed, the temporary injunctions dissolved and judgments rendered in favor of the city for its costs and damages. The banks all superseded the judgment and prosecuted appeals to the court of appeals, and the judgments of the circuit court were all affirmed. 102 Ky., 174. Writs of error were then sued out by the banks and the cases all taken to the supreme court of the United States where they were heard and affirmed.

With the exception of costs and damages on the dissolution of the injunctions and on the *supersedeas* bonds, where was there any recovery by the city of Owensboro? With the exception mentioned, there was nothing "recovered" and nothing "collected." When the suits were dismissed and the injunction dissolved by the circuit court, and its judgments affirmed, the tax collector and the city were left in the precise status occupied by them before the suits were commenced. The city sought no affirmative relief and obtained none, sued for nothing, recovered nothing and appellant collected nothing during his term of office.

A motion has been made to dismiss the cross-appeal. The whole case on appeal and cross-appeal was submitted at last

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term. This motion it seems to me comes too late; it ought not now be permitted, but the question decided when the whole case is determined. But, we respectfully submit, that the appeal brings the whole case before this court, and this court ought to consider the whole matter involved in the litigation. It is a claim for commissions. The appellant in his motion for a new trial assigned for error: "Tenth. The court erred in dismissing the residue of the petition after rendering the judgment for \$111.18." The consideration of this alleged error necessarily requires the court to consider the correctness of the whole judgment rendered by the court below. The matter in litigation is all blended together. It is one cause of action. The case of *Brown v. Van Cleave*, 86 Ky., 381, is conclusive of the appellee city's right to a cross-appeal. The judgment rendered was not "wholly distinct" from the cause of action set up in the petition, but on the contrary was for a part of that cause of action. As the plaintiff appeals does he not necessarily bring up the whole cause of action? The court below erred in the manner pointed out in the assignment of errors by the city.

The contention of the city is: (1) that inasmuch as no judgments were rendered for the taxes, and no taxes were ever collected by appellant, he is not entitled to any commissions; (2) that as appellant never collected anything on the judgments rendered, for damages on dissolution of the injunctions and on the *supersedeas* bonds, he is not entitled to claim commissions on the amount of such judgments, and that the court erred, therefore, in giving him judgment for a sum equal to ten per centum on the amount of the judgments recovered on the dissolution of the injunction bonds and *supersedeas* bonds.

The collections were delayed by the litigation carried on in regular course by the banks and by superseding the judgments, for more than a year after appellant's term of office expired. The city, therefore, was powerless to collect the money, and did not collect it until long after his term expired. When his term expired he was *functus officio* and his duties and responsibilities ceased. The duties and responsibilities, and the right to commissions, if any, ceased and passed to his successor in office, Mr. Chapeze Wathen. *Hendrick v. Posey*, 104 Ky., 20.

We therefore pray the court to affirm this case on the original appeal and reverse it on the cross-appeal.

CITATIONS.

Kentucky Statutes, secs. 2740, 3311 to 3314, 3424; Owensboro Bank Tax Cases, 19 Ky. Law Rep., 248, 102 Ky., 174; Same cases in the U. S. Supreme Court, 173 U. S., 636, 664;

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Hendrick v. Posey, 104 Ky., 20; Bouvler's Law Dict., Commissions; The Pacific, Deady, 192 (U. S. Cir. Ct. Rept.); Brown v. Van Cleave, 86 Ky., 381.

OPINION OF THE COURT BY JUDGE HOBSON—AFFIRMING.

Appellant was the attorney of the City of Owensboro from January 1, 1894, to January 1, 1898. In the year 1894 there was a controversy between the banks and the city as to whether they were liable to municipal taxation. As city attorney, appellant advised the tax collector to proceed to collect the taxes. As soon as proceedings were instituted for this purpose by the tax collector, the banks filed their petitions in the Daviess circuit court, obtaining an injunction against the collection of the taxes. Appellant, as city attorney, was directed to defend the suits, which he did, and on March 2, 1895, obtained a judgment in the Daviess circuit court dismissing the petitions, and dissolving, with damages, the injunctions. The damages awarded on the dissolution of the injunctions amounted to something over \$1,000. The banks prosecuted an appeal from the judgment of the Daviess circuit court to this court. Appellant, as city attorney, represented the city on these appeals, and on March 24, 1897, obtained an affirmance of the judgment of the circuit court, with 10 per cent. damages on the supersedeas. From the decision of this court the banks, on August 30, 1897, prosecuted an appeal to the supreme court of the United States, and before that appeal was heard appellant's term as city attorney ended. After the end of his term, he wrote to the city council, calling attention to the cases, and offering to go to Washington and attend to them, if the council wished him to do so. The council laid the communication on the table. Appellant, however, at his own expense, went to Washington, and, in connection with his successor, the acting city attorney, attend-

ed to the cases in the supreme court; his expenses in this matter being something over \$90. On April 3, 1899, the supreme court affirmed the judgment of this court. After this the city council directed its tax collector to collect the taxes, which he did, and refused to pay appellant anything for his services, or on account of his expenses, and he thereupon filed this suit to recover therefor. The amount collected by the city tax collector from the banks was \$18,859.56, and appellant insists that a much larger amount was due by them which the tax collector failed to collect. He claims that he is entitled to 10 per cent. on the amount paid by the banks, or which should have been paid by them.

Section 3314, Kentucky Statutes, is as follows: "The city attorney shall be paid an adequate annual salary, payable monthly out of the city treasury, the same to be fixed by ordinance before his election and not changed during his term of office. In addition to his salary, the city attorney shall be paid his expenses when it shall be necessary for him to go out of the city to attend to legal business for the city, and ten per cent. upon all sums recovered and collected for him for the city." As appellant was not city attorney when he went to Washington, and was not requested or employed by the council to go there, he has no claim against the city for his expenses in this behalf. The city attorney then in office did go in behalf of the city, and was in Washington attending to the matter, and appellant's position in the case was wholly that of a volunteer. He has no claim, therefore, against the city, for the docket fees allowed in that court, or for his personal expenses. The services rendered in the Daviess circuit court and this court stand upon a different plane. He was the city attorney when these services were rendered. In attending to the cases he was in discharge of his duties as city attorney.

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Whether such services, in the contemplation of the statute, were covered by the "adequate annual salary, payable monthly out of the city treasury," as therein provided, or whether he is therefor entitled to 10 per cent. of the sums in controversy in those actions, is a question which must be determined from the language of the statute itself. The suits which the banks had brought against the city were proceedings instituted by them to prohibit the city from collecting the taxes. Appellant merely defended these suits. He did not recover anything in those actions, except the damages on the dissolution of the injunctions and the damages on the supersedeas. The term "recover" has a well-defined meaning of the law, and this meaning has been the matter of adjudication by this court prior to the adoption of the present statutes. Under the statute giving an attorney a lien for money or property, which may be recovered in an action prosecuted by him, it was held that the defendant's attorney, who merely defeated a judgment which was sought against his client, had no lien on the fund which was in controversy. *Wilson v. House*, 73 Ky., 406. We therefore conclude that for merely defending the suits brought by the banks it can not fairly be said that appellant recovered anything for the city, except the judgment for damages, and that he is not entitled, under the statute, to 10 per cent. of the amount of the taxes in controversy in that case, which he did not in any legal sense recover. The purpose of the statute seems to have been to make the attorney diligent in recovering and collecting money due the city where the claim was placed in his hands for collection. If the statute were construed to give the attorney 10 per cent. of the amount in controversy in all actions which he might defend, the purpose of the statute in provid-

ing for him an adequate annual salary would be entirely defeated.

The court adjudged appellant entitled to 10 per cent. of the damages recovered by him for the city, and of this the city complains on the ground that he did not collect the money. But the statute should receive a reasonable construction. Appellant obtained a judgment for the money, and an affirmance of the judgment of this court. The collection of the judgments was delayed by the appeal to the supreme court of the United States, without his fault, and by matters over which he had no control. He did all he could do. The judgments were good, and, in view of appellant's faithful services for the city, and his skill and efficiency in those actions securing to the city valuable rights, which it enjoys, we are not prepared to say that, under all the facts of the case, there was any error of the court in the judgment to this extent.

The judgment complained of is therefore affirmed on the original and cross-appeal.

Petition for rehearing by appellant overruled.

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CASE 81—ACTION BY MARY J. GOODIN AGAINST JOHN H. WILSON TO ENFORCE A LIEN ON LAND ON WHICH EXECUTION HAD BEEN LEVIED, BUT TO WHICH THE OWNER HAD ONLY AN EQUITABLE TITLE.—FEB. 4.

Goodin v. Wilson.

APPEAL FROM KNOX CIRCUIT COURT.

JUDGMENT FOR DEFENDANT AND PLAINTIFF APPEALS. **AFFIRMED.**

EXECUTION LEVY—TITLE UNDER SALE BY COMMISSIONER AFTER CONFIRMATION, BEFORE DEED MADE.

Held: 1. Under Civ. Code Prac. sections 394, 397, 399, 494, providing that the court may appoint a commissioner to execute its judgments, and cause title to be conveyed by him by conveyance, approved by the court, on a sale under a judgment, and that such conveyance shall convey to the grantee the title of the parties to the action, and Kentucky Statutes, sections 1681, 1709, providing that lands to which the defendant has a legal title may be sold on execution, the interest acquired by a purchase of land at a commissioner's sale, before a commissioner's deed is executed, is not subject to sale under execution.

JOHN T. HAYS, FOR APPELLANT.

The contention of counsel for appellant is that where an execution debtor has purchased a tract of land at commissioner's sale and said sale has been reported to court and confirmed by the court, that the title to the land thereby vests in the purchaser to such an extent that it is subject to a levy of an execution thereon against such purchaser, and that by the levy of such execution the execution creditor thereby acquires a lien on the land which a court of equity should enforce in an equitable action therefor.

AUTHORITIES CITED.

Ball, &c. v. First Nat. Bank Covington, 80 Ky., 502; Hughes v. Swope, 88 Ky., 257; Robertson v. Robertson, 14 Ky. Law Rep., 505; Kentucky Statutes, 1681.

JOHN H. WILSON AND HAZELRIGG & CHENAULT, FOR APPELLEE.

Appellant admits that the sale of the appellee's interest in the land acquired by reason of his purchase at commissioner's

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sale and the confirmation of such sale, could not be sold under the levy of an execution thereon, but now comes into court and attempts to do *indirectly* what is admitted could not be done *directly*. In other words it is admitted that a sale of the land can not be made under the levy, yet it is contended that the levy gives a lien which is enforceable by the courts.

The appellee contends that as no levy upon landed interests can be made without statutory authority, therefore no lien can be acquired under a levy not authorized by statute, and further, that there is no statute authorizing a levy on land to which the execution defendant has no legal title and that the confirmation of a sale made by a commissioner does not invest the purchaser with the legal title.

AUTHORITIES CITED.

Sec. 1681, Kentucky Statutes; *Newsom v. Kurtz*, 86 Ky., 277; *Whitaker v. Cornett*, 14 Ky. Law Rep., 871; 17 A. & E., 1029.

OPINION OF THE COURT BY JUDGE BARKER—AFFIRMING.

Appellant, Mary J. Goodin, obtained a money judgment against appellee, J. H. Wilson, in the Knox circuit court, upon which she caused to be issued an execution, which was placed in the hands of the sheriff of Knox county for the purpose of enforcing satisfaction of her demand. The sheriff attempted to levy said execution upon a tract of land, described by metes and bounds in his return on the writ, as the property of appellee. This execution was returned by the sheriff without further action than the indorsement of the levy, whereupon the appellant, for the purpose of enforcing her supposed lien, instituted this action in the Knox circuit court, setting up her judgment, the execution thereon, and the levy of the officer upon said land, and reciting the fact that appellee's title to the land in question was obtained by a purchase at decretal sale in the case of *Tinsley v. Tinsley*, in the Knox circuit court; that appellee had purchased said land for the sum of \$2,000, for which he had executed bonds payable to the commissioner of said court, one W. F. Westerfield, who was made a party

defendant to the action, and called upon to set up and enforce his lien for the unpaid part of the purchase money, which appellant alleges she was advised amounted to about \$400.

The petition recites the further fact that while appellee's bid had been accepted, and the sale to him confirmed by the court, no deed had ever been executed or delivered to him for the land in question. An entirely immaterial amended petition was filed by appellant, whereupon a general demurrer was filed by appellee, J. H. Wilson, to the petition as amended, which was sustained by the court; and, appellant declining to plead further, her petition was dismissed, and she has appealed to this court.

The question for adjudication on this appeal is whether or not the land in question, under the foregoing statement of facts, was subject to levy and sale under an execution. Land is subject to levy under execution in Kentucky only when the execution defendant holds the legal title thereto. A mere equitable title of a debtor can not be thus subjected to the satisfaction of a creditor's claim. Sections 1681, 1709, Kentucky Statutes; *Newsom v. Kurtz*, 86 Ky., 277 (9 R., 587) 5 S. W., 575; *Whitaker v. Cornett* (14 R., 871) (21 S. W., 645). It becomes, therefore, necessary to ascertain whether or not, under the allegations of the petition in this case, the debtor, Wilson, had a legal or mere equitable title in the land alleged to have been purchased by him at a judicial sale; his purchase having been confirmed by order of the court, and himself put in possession of the land in question, but for which there had not been executed and delivered to him a commissioner's deed. In other words, does a purchaser at a judicial sale obtain a legal title by the order of confirmation of the court, or by the execution and delivery of the commissioner's deed in pursuance of the

order of the court? We have been referred to several cases decided by this court in which the opinions contain language which, from a superficial examination, would seem to hold that the legal title passes to a purchaser at judicial sale by the order of confirmation. These cases are *Taliaferro v. Gay*, 78 Ky., 496; *Ball v. Bank*, 4 R., 400, 80 Ky., 502; and *Hughes v. Swope*, 88 Ky., 254 (8 R., 256) 1 S. W., 394. The first two of these cases involved a dispute as to the apportionment of rent accruing from land pending the litigation in which it was sold. In neither of the cases did the court have the particular question involved here before them for decision. In both cases the court, in discussing the apportionment of the rents between the contending parties thereto, fix the date of confirmation as the point from which the purchaser was entitled to the rents accruing from the land; and while, as said before, the court use strong language as to the title of the purchaser after confirmation, they are speaking more as to the certainty and stability of the title after confirmation, as compared with the rights of the purchaser between the date of sale and confirmation than of the quality of the title; and, when the court speak of the purchaser having a perfect title after confirmation, they mean, rather, that his title at that time passes beyond the control of the court to set it aside, than that he acquires the legal title as contradistinguished from the equitable title. In the case of *Hughes v. Swope* there was a contest between two purchasers at a judicial sale for the property; and here, as in the two cases discussed *supra*, the court did not have before them the question as to whether the purchaser had a legal or equitable title; but they were discussing the respective rights of the two purchasers at the two sales of the property had in the case, and the precise question which we have here was not involved.

Section 394 of the Civil Code of Practice provides that real property may be conveyed by a commissioner appointed by the court (1) if by the judgment in an action a party be ordered to convey such property to another; (2) if such property have been sold under a judgment or order of the court, and the sale confirmed. Section 397 provides that a conveyance made in pursuance of sale ordered by the court shall pass to the grantee the title of all the parties to the action or proceeding. Section 398 provides that a conveyance by a commissioner shall not pass any right until it has been examined and approved by the court, which approval shall be indorsed on the conveyance, and recorded with it. Section 399 provides: "It shall be necessary for the conveyance to be signed by the commissioner only, without affixing the names of the parties whose title is conveyed; but the names of such parties shall be recited in the conveyance." Section 494 of the Codes concerning sales, provides: (1) The court shall appoint a suitable person, as commissioner to execute its judgment; (2) the court shall cause a title of the property to be conveyed by a commissioner to the purchaser, without warranty; (3) the conveyance must be acknowledged before and approved by the court, and certified by its clerk to the clerk of the county court for record. It would seem, from these provisions of the Code, that, in order to obtain the legal title to land sold at a judicial sale, it is necessary that there should be a deed executed and delivered by the commissioner of the court, which has been acknowledged before, and approved by, the court. Rorer on Judicial Sales (section 128) is as follows: "The contract of sale is only executed so as to pass the title by payment of the money, and the execution and delivery of the deed, duly approved or confirmed by the court, as the practice may be." And in section 427 it is said: "Although the sale, in a

popular point of view, is supposed to have been made when the bargain is closed, yet in a legal sense the sale is not complete until the deed is delivered. Therefore it follows that, as the making of the deed is a part of the act of selling, the person appointed to sell is the only one who can make the deed. The sale is not perfected until confirmation thereof, and delivery of the deed; and in some cases, as where approval of the deed by the court is also required, then only by the additional act of approval." Jones, in his work on Mortgages (section 1637), states the rule as follows: "The acceptance of the bid confers no title upon the purchaser, and not even any absolute right to have the purchase completed. He is nothing more than a preferred bidder, or proposer for the sanction of the court afterwards. When this is given, it relates back to the time of sale, and carries the legal title from the delivery of the deed, and the equitable title without a deed." The American and English Encyclopaedia of Law (2d Ed., section 16 of title "Judicial Sales") states the rule as follows: "In a few cases it has been held that on a judicial sale the title passes to the purchaser on his compliance with the terms of the sale, though no deed has been executed to him. . . . As a general rule, however, the purchaser acquires no more than an equitable title prior to the execution of a proper deed."

The contention of appellant's counsel that the right of possession and the right to receive rents necessarily carries with it the legal title can not be maintained. There are many instances where the legal title may be in a trustee, with the possession and the right to the usufruct of the property remaining in the *cestui que trust*. It seems to us, therefore, that the title of appellee, Wilson, in the land in question, was merely an equitable one, and that,

as such, it was not subject to levy or sale under execution, and that appellant's remedy for subjecting the same to the payment of her debt is under the provision of section 439 of the code, and not under sections 1681 or 1709 of the Kentucky Statutes.

Holding this view, we think the court below did not err in sustaining the demurrer to the petition as amended, and, upon appellant's refusal to plead further, in dismissing her petition. Wherefore the judgment is affirmed.

CASE 82—JONAH HARDIN WAS INDICTED AND CONVICTED OF MALICIOUSLY SHOOTING AND WOUNDING ANOTHER WITH INTENT TO KILL.

Hardin v. Commonwealth.

APPEAL FROM LOGAN CIRCUIT COURT.

DEFENDANT CONVICTED AND APPEALS. REVERSED.

MALICIOUS SHOOTING AND WOUNDING WITH INTENT TO KILL—STATUTORY DEFINITION—INSTRUCTIONS UNDER COMMON LAW.

Held: In a trial of one who is indicted under Kentucky Statutes, section 1166, charging him with "unlawfully, wilfully and maliciously shooting and wounding another with a deadly weapon with intent to kill," which is a felony, and which covers the minor offense under Kentucky Statutes, section 1242, of shooting and wounding another in a sudden affray or in sudden heat and passion, without previous malice and not in self defense," both being statutory offenses, must be tried under the statute and not as a common law offense, and it was error in the trial court in charging the jury "to find the defendant guilty if they believed from the evidence he wilfully and maliciously shot and wounded another with intent to kill him not in his apparent self defense," by adding thereto the words "and under circumstances reasonably calculated to excite his passions beyond his power of self control."

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MARMADUKE B. BOWDEN, FOR APPELLANT.

The first error complained of is that the court erred in its instruction to the jury in defining the statutory offense under which appellant was indicted, by adding words not in the statute, requiring the guilt of the defendant to depend on "*circumstances reasonably calculated to excite his passions beyond his powers of self control.*"

Our contention is that the statute does not explicitly even authorize the jury, once they are satisfied that the motive was "sudden heat and passion," to consider whether the circumstances were such as were "reasonably calculated" to excite beyond control the passions of a man of *ordinary self control*. *Baker v. Commonwealth*, 6 Ky. Law Rep., 442; *Slaughter v. Commonwealth*, 15 Ky. Law Rep., 230.

CLIFTON J. PRATT, ATTORNEY GENERAL, AND M. R. TODD, FOR APPELEE.

1. The objectionable words in the instructions are these: 'And under circumstances reasonably calculated to excite his passions beyond his power of self control.'

These words are not found in the statute, but we insist that the use of these words by the trial court were not prejudicial as they draw the line of separation between a wilful, malicious act and one done without premeditation and malice. The failure of the court to follow the language of the statute in the instructions on the trial for a statutory offense, is not a ground for a reversal provided the instructions embrace the meaning of the statute.

2. The defendant's motion for a new trial on the ground of newly discovered evidence was properly overruled, because (1) the evidence was merely cumulative, and (2) there was no diligence used in trying to procure it.

AUTHORITIES CITED.

Kentucky Statutes, secs. 1242, 1166; *Watson v. Com.*, 15 R., 360, *Rapp v. Com.*, 14 B. M., 494; *Com. v. Young*, 2 Duv., 375; *Wilson v. Com.*, 3 Bush, 105; *Baker v. Com.*, 6 Rep., 442; *Slaughter v. Com.*, 15 Rep., 230; *Bishop's New Crim. Law*, vol. 2, sec. 710; *Campbell v. Com.*, 10 Rep., 978; *Crim. Code*, sec. 269; *Gamble v. Com.*, 15 Rep., 477; *Cosby v. Com.*, 12 Rep., 982; *Hatton v. Com.*, 7 Rep., 46; *Edington v. Com.*, 7 R., 377.

OPINION OF THE COURT BY JUDGE NUNN—REVERSING.

The appellant was tried in the Logan circuit court on an indictment charging him with unlawfully, wilfully, and maliciously shooting and wounding one Will Gaines,

with the intent to kill said Gaines; and on the trial the evidence showed that the appellant was at the time the keeper of a poolroom in the town of Russellville, and Gaines and others were in front of his building, using boisterous language, and that appellant went out of his room, on the pavement, where the parties were, and requested them to keep quiet or leave, and appellant and Gaines had an altercation of words, all that was said and done not being made clear; but the accused stepped back, or in his door, and fired and wounded Gaines in the leg.

The court gave to the jury instructions, of which No. 2 was excepted to by the appellant, and is as follows: "The court instructs the jury that if they believe from the evidence, to the exclusion of a reasonable doubt, that the defendant, Jonah Hardin, did, in Logan county, Ky., within one year before the finding of the indictment, unlawfully and wilfully, and not in his necessary self-defense, or apparently necessary self-defense, and in sudden affray, or sudden heat and passion, without previous malice, and under circumstances reasonably calculated to excite his passions beyond his power of self-control, shoot at and wound one Will Gaines, upon his body or person, with a pistol, a deadly weapon, loaded with leaden ball or balls, or ball or balls of other hard substance, with the intent to kill him, but without so doing then and in that event the jury shall find the defendant not guilty as charged in the indictment, but guilty of shooting and wounding in sudden affray, or sudden heat and passion, and fix his punishment at a fine of not less than \$50 nor more than \$500, or imprisonment in the county jail for a period of time not less than six months nor more than twelve months, or both fine and imprisonment, in their discretion.

Prior to the enactment of the statutes defining the of-

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fenses described in sections 1166 and 1242 of the Kentucky Statutes, the offenses named therein were misdemeanors under the common law. The Legislature of the State deemed it necessary to enact statutes with reference to such offenses, and in doing so it defined the offense of shooting and wounding another, as described in section 1166, and the offense of shooting in sudden affray or in sudden heat and passion, as defined in section 1242, and fixing the penalties to be imposed under each section. The offense as defined in section 1242 is, "If any person shall, in sudden affray or in sudden heat and passion, without previous malice, and not in self-defense, shoot at," etc. This we understand to be a complete definition of the offense to be punished by said section. If the Legislature had intended that the language used in instruction No. 2, "and under circumstances reasonably calculated to excite his passions beyond his power of self-control," be added to said definition, it would have been in said section.

It is contended by the Commonwealth that the same principles governing a prosecution under sections 1166 and 1242 of the Statutes are the same as the common law offenses of murder and voluntary manslaughter; and counsel refer this court to the cases of *Rapp v. Com.*, 14 B. Mon., 615, and *Com. v. Yancy*, 2 Duv., 375. In these cases the court was discussing common law offenses, and the language used by the court is subject to the construction claimed by the attorney general. But in our opinion the cases referred to have no application to prosecutions under the two sections of the statutes above referred to, for the reason that the common law definition of murder is a very different thing from the statutory offense of shooting and wounding as described and defined under section 1116, and the definition

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of the common law offense of voluntary manslaughter is a very different thing from the statutory offense of shooting and wounding as described and defined under section 1241 of the statutes; and the court, in said instruction No. 2, should have confined itself to the definition as given in section 1242 of the statutes, and the interpolation of the language referred to was prejudicial to the appellant.

Wherefore the judgment of conviction of appellant is reversed, and the case remanded to the lower court for proceedings consistent with this opinion.

CASE 83—PROSECUTION AGAINST ROBERT INGRAM FOR SEDUCTION UNDER PROMISE OF MARRIAGE.—FEB. 5.

Ingram v. Commonwealth.

APPEAL FROM METCALFE CIRCUIT COURT.

DEFENDANT CONVICTED AND APPEALS. REVERSED.

SEDUCTION—EVIDENCE—HARMLESS ERROR—OFFER TO MARRY—DEFENSE.

- Held: 1. In a prosecution for seduction under promise of marriage, where there was evidence that defendant offered to marry prosecutrix after the alleged seduction, and that she saw her father and defendant in consultation with reference to the proposed marriage, it was error to refuse to allow prosecutrix to testify on cross-examination as to a conversation between herself and defendant immediately after the latter's interview with the father, in which defendant stated that he had told the father of the seduction, notwithstanding which he had refused his consent to the marriage.
2. Exclusion of this evidence was, however, non-prejudicial, in view of the testimony of both defendant and the father that, at the time of the conversation, defendant did not tell the father that he had had sexual intercourse with prosecutrix.
3. Under Kentucky Statutes, c. 36, subd. 12, section 1214, declaring that no prosecution for seduction shall be instituted when the person charged shall have married the girl se-

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duced, and any prosecution shall be discontinued if accused marry the girl before final judgment, a *bona fide* offer to marry the prosecutrix before the institution of the prosecution, though refused by her, is a complete defense.

M. O. SCOTT & W. S. PRYOR, FOR APPELLANT.

1. Our contention is that it is in the power of the defendant at any time before judgment, to marry the girl whom he has seduced and be exonerated, or if he offers to marry her in open court in good faith and she refuses, the prosecution should be dismissed.

2. The refusal of the court to instruct the jury that if the defendant offered to marry the prosecutrix in good faith after the seduction, he should be acquitted, was error. *Wright v. Com.*, 16 Ky. Law Rep., 251; Ky. Statutes, sec. 214.

CLIFTON J. PRATT, ATTORNEY GENERAL, AND M. R. TODD, FOR APPELLEE.

The defendant admits the seduction and seeks to relieve himself of the law's just penalty for the offense, by saying that he desired to marry her and offered to do so.

The appellant offered to prove by her "that he told her that he said to her father he wanted to marry her and that he had had intercourse with her but her father would not let her marry." This evidence was properly rejected by the court as hearsay.

But conceding the evidence to be competent it was not prejudicial error to exclude it, as the appellant had not complied and is now unable to comply with the statute by marrying her as he has married another woman since the seduction.

OPINION OF THE COURT BY JUDGE SETTLE—REVERSING.

The appellant, Robert Ingram, colored, was indicted in the Metcalfe circuit court for the seduction under promise of marriage, of one Curtis Pendleton, also colored,—a female under twenty-one years of age. The trial resulted in a conviction, his punishment being fixed by the verdict of the jury at three years' confinement in the penitentiary. The motion of appellant for a new trial having been overruled, he prosecutes this appeal.

There are but two questions necessary to be considered by this court: First. Did the lower court err in refusing

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to permit appellant's counsel, upon cross-examination, to ask the prosecutrix in reference to a conversation she had with appellant, in which the latter claimed to have reported to her what had been said by her father in refusing his consent to their marriage? Second. Did the court err in refusing to give instruction No. 3 asked by appellant's counsel?

The following facts seem to be fully established by evidence, viz.: First, that appellant did on at least two occasions have sexual intercourse with the girl, Curtis Pendleton; second, that he did promise to marry her, and, third, that the father of the girl refused his consent to such marriage. There is, however, this difference between the statements of the prosecuting witness and those of appellant: She says the promise of marriage was made by appellant before and when he first had carnal knowledge of her, and he says it occurred afterward. She also testified that no other man ever had similar intercourse with her, and that she would not have yielded her person to the gratification of appellant's lust but for his promise to marry her, and his assurance, as a minister of the gospel, that he would comply with his promise. Appellant testified that, after his illicit intercourse with the girl, he offered, in good faith, to marry her, and asked her father to permit him to do so, but the latter refused his consent; that he then reported to the daughter what the father said, and she refused to marry him without her father's consent. Appellant further testified that he later went to see the girl, and offered to take her to Tennessee and marry her without her father's consent, but she refused to go with him, and not a great while thereafter, he married another woman. These conversations were denied by the girl in rebuttal, and she also testified that she did not refuse to go with him to Ten-

nessee to be married, but, upon the contrary, asked him to take her to that State for that purpose, which he refused to do. George Pendleton, the father of Curtis, when introduced as a witness, admitted that appellant had asked his permission to marry her, but that he had refused his consent on account of her youth, and so informed appellant. He also testified that he did not know at the time of the conversation with appellant that the latter had seduced his daughter. The question asked by appellant's counsel of the girl on cross-examination, which she was not permitted by the court to answer, was, in substance, as follows: "When the defendant returned to you from your father, did he not state to you what had passed between him and your father about the marriage, and tell you what your father said about it?" It was avowed by counsel that the witness, if permitted to answer the question, would have said: "The defendant did tell me that he had stated to my father that he had had intercourse with me, but that my father would not let me marry him, and I told him that I knew I was pregnant, but I would not marry him or go to Tennessee with him." Though the avowal shows that a part of the expected answer would not have been responsive to the question, still we think the question not improper, as the girl testified that appellant, with her knowledge, went to her father to obtain his consent to their marriage, and she saw them in consultation; and, as he immediately reported to her what had been said by the father, she should, we think, have been permitted to state all that was said by appellant and herself when he reported to her the conversation with her father. We are of opinion, however, that the refusal of the lower court to permit the question to be answered did not operate to the prejudice of appellant, as he and George Pendleton both

testified that he did not, in the conversation mentioned, inform the latter that he had had intercourse with the daughter.

While we do not think it would have been proper for the lower court to instruct the jury in form as set forth in instruction No. 3 asked by counsel for appellant, we are of the opinion they should have been instructed, in substance, that if they believed from the evidence that appellant, after the seduction of Curtis Pendleton, and before his marriage to another woman, in good faith offered to marry her, but was prevented from doing so by her refusal to consent thereto, if she did so refuse, he was entitled to an acquittal. Such an instruction, with those given by the court, would, we think, have presented the whole law of the case to the jury.

The prosecutrix and her father corroborate the appellant as to the offer of marriage made by him at the time the father refused his consent, and, though the daughter denied that any offer of marriage was made by appellant after her father's consent was refused, appellant testified that he did again, and in good faith, make such offer, notwithstanding the opposition of the parent. We are unable to say what credit, if any, was given by the jury to these statements of appellant, or what weight they might have given them under proper instructions from the court. In any event, we know the failure of the trial court to instruct the jury as indicated deprived appellant of any benefit that he might otherwise have received from his testimony with respect to the offer of marriage, as effectually as if the testimony had been excluded altogether from the consideration of the jury.

The statute under which this prosecution against appellant was instituted (section 1214, subd. 12, c. 36, Ken-

tucky Statutes) provides that: "No prosecution shall be instituted when the person charged shall have married the girl seduced, and any prosecution instituted shall be discontinued if the party accused marry the girl seduced before final judgment. All prosecutions under this section shall be instituted within two years after the commission of the offense." This court, in the case of the Commonwealth v. Wright, 16 R., 251, 27 S. W., 815, affirmed the judgment of the circuit court, which dismissed an indictment for seduction against Wright, who appeared in court upon the call of the case for trial, and offered then and there to marry the woman whom he had seduced, but she refused the offer, and the marriage did not take place. In recording its approval of the action of the lower court in dismissing the prosecution, this court said: "The marriage of the parties is the purpose, intent, and spirit of the statute. Within its keeping, the past misery and shame may be forgotten, the future happiness of both secured; so that, the statute being so construed, although the seducer be forced almost to the very doors of the penitentiary before offering to fulfill his promise of marriage, yet, having done so in good faith, and his offer having been declined, he can do no more. The woman, and not the man, defeats the object and purpose of the law." If, therefore, the offense denounced by the statute may, as in the case *supra*, be condoned because of an offer of reparation made at the eleventh hour, may not an earlier offer of atonement by the offender merit a like favor at the hands of the law? Appellant testified that such an offer was made by him in good faith, and if so, and it was rejected by the prosecutrix, the defense thus presented was authorized by the statute, and the jury should have been instructed thereon by the court.

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For the reasons indicated, the judgment of the lower court is reversed, and the case remanded for a new trial, and such other proceedings as may not be inconsistent with this opinion.

CASE 84—ACTION BY HENRY P. RALEIGH AGAINST J. EDWARD CLARK
FOR DAMAGES FROM SURFACE WATER—FEB. 6.

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APPEAL FROM DAVIESS CIRCUIT COURT.

JUDGMENT FOR DEFENDANT AND PLAINTIFF APPEALS. REVERSED.

SURFACE WATER—DRAINAGE OVER LOWER LAND—LIMITATION—
WAIVER—CONTRACT TO MAINTAIN DITCH—BREACH—MEASURE OF
DAMAGES.

- Held: 1. Plaintiff and defendant owned adjoining farms; defendant's being higher, and draining over plaintiff's into a creek. Before plaintiff purchased, defendant had permitted a third party to cut a ditch through his land, which turned onto plaintiff's farm water which would not naturally flow there. Afterwards he agreed with plaintiff to construct and keep open a continuation of the ditch from plaintiff's line to the creek, etc. This agreement was performed for several years. HELD, that if defendant had acquired the right to maintain the ditch, as originally constructed by the third party, by limitation, he waived it by his subsequent conduct.
2. Defendant, whose farm adjoined plaintiff's and drained over it into a creek, agreed to construct and keep open a ditch from plaintiff's line to the creek, and afterwards let the ditch fill up, whereby plaintiff's land was overflowed, and his crops damaged. HELD, that if plaintiff, by himself cleaning out the ditch, could have avoided the damage, he was only entitled to recover from defendant the reasonable cost of opening the ditch and keeping it open.

MILLER & TODD AND ELI H. BROWN, FOR APPELLANT.

The issues as joined by the parties were:

1. The appellant affirmed that the appellee had constructed a

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north and south ditch and other furrows and channels on his own land all leading to appellant's land in which water accumulated and was discharged in large volumes and with great force upon appellant's land to his great damage, etc.

2. That appellee agreed to open and keep open a ditch from the mouth of his north and south ditch across appellant's land to a connection with Knob Lick Creek, and of sufficient capacity to carry off all water flowing from the north and south ditch and to open and keep open one-half of the ditch on their east and west line emptying into the north and south ditch and thence into the creek and thereby to protect appellant's land from the water falling on and flowing across appellee's contiguous land, and that appellee failed and refused to keep either of his undertakings.

This agreement was made some eight or ten years before suit was brought.

It was set up in the pleadings by way of avoidance of the defense set up in the answer that the water flowing from another tract known as the Mattingly land as well as that from appellee's land, flowed through the north and south ditch on appellant's land and that the water from Mattingly's land flowed through a ditch that had existed on the Mattingly land for more than fifteen years, alleging that the ditch on the Mattingly land had been made and connected with appellee's north and south ditch for a consideration paid to and accepted by appellee by the then owner of the Mattingly land, all of which was controverted.

The court instructed the jury that if the ditch leading from the Mattingly land from defendant's land to plaintiff's land had been constructed and maintained continuously for fifteen years or more before the contract between plaintiff and defendant for the continuation of said ditch through plaintiff's land to Knob Lick under a claim of right, that defendant is not liable for damages that plaintiff may have sustained by water flowing through same, though he failed to comply with the agreement to keep the ditch open on plaintiff's land.

We submit that this instruction was error, and forestalled all consideration of the merits and real issues which should have been presented by proper instructions.

SWEENEY, ELLIS & SWEENEY, FOR APPELLEE.

Appellant's whole case is based upon the distinct idea that his crops were damaged and that he sustained injury as the direct result of appellee's failure to keep open the ditches over appellant's land.

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Assuming the allegations to be true, can appellant plant crops, cultivate them to a certain extent and then stand by and allow them to be destroyed *simply and only because the ditches over his own land were not kept open by appellee?*

We contend that independent of any agreement between himself and appellee the law would require appellant to open and keep open the ditches on his own land so as to protect his crops from damage and charge the cost in that respect to appellee, if appellee had agreed to do it and had refused or failed to do it.

Appellee contends that he had the right under the law to collect water upon his land in artificial drains or channels in the manner stated in plaintiff's petition, though it might result in the flow of surface water on the lands of appellant more swiftly than it would otherwise flow, because in the very nature of the subject this is an inconvenience to which the inferior proprietor must necessarily submit in view of the inferior nature of his estate.

If this Mattingly ditch was established and has been maintained in its present position for twenty-five or thirty years, as appellant admits, then it follows as a matter of law that plaintiff's cause of action was barred by limitation as set out in instruction No. 5 as given by the court.

There is no claim in plaintiff's petition for any damages on account of water which flows through the Mattingly ditch and it follows that no instruction which the court could have given or might have refused has prejudiced appellant.

AUTHORITIES CITED.

Am & Eng. Ency., 1st Ed., vol 24, 903; Kemper v. Louisville, 14 Bush, 187; Gould on Water, secs. 267, to 276; 89 Am. Dec., 563; 40 Am. Rep., 519; Vannest v. Flemming, 18 Am. Rep., 387; Hughes v. Anderson, 44 Am. Rep., 147; Johnson v. Owensboro & N. R. R. Co., 18 Ky. Law Rep., 276; L. & N. R. R. Co. v. Orr, 91 Ky., 109.

OPINION OF THE COURT BY JUDGE HOBSON—REVERSING.

Appellant and appellee are farmers living on Knob Lick creek, in Daviess county. It is a flat country, and the stream seems to be a sluggish one. Appellant's land is lower than appellee's, and lies north of it, between appellee's farm and the creek. To the west of appellee's land is a tract known in the record as the "Mattingly Land."

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The drainage from the Clark and Mattingly tracts, is, by nature, over the land of Raleigh to the creek, but all of the Mattingly land does not drain this way. Many years ago, Clark allowed Mattingly to cut a ditch through his land, which turned down on the Raleigh place water that would not by nature flow there. This was before Raleigh bought it. The ditch seems to have run to a swag near the line, and there stopped. The line between Raleigh and Clark runs east and west. The ditch referred to runs practically from south to the north. Clark bedded up his land as seems to be customary in that section, and also dug another ditch. The bed furrows and these ditches took the water down on Raleigh in greater quantities and more rapidly than it would flow on him by nature. In this condition of things, after he bought, an agreement was made between him and Clark by which Clark agreed to extend the Mattingly ditch from Raleigh's line to the creek, and to keep it open; and Clark and Raleigh each agreed to dig a ditch on Clark's land, running east and west on the line between them, to carry the water coming down off Clark's land into this ditch, which Clark was to cut out to the creek. Clark was to dig the ditch on the line on one side of the Mattingly ditch, and Raleigh on the other side, and the dirt was to be thrown on the lower side of the ditch. Clark cut the ditch out to the creek, making it something like six feet wide and three feet deep. He and Raleigh also cut the ditch on the line, leading into this ditch, making it four feet wide and two feet deep, and throwing the dirt on the lower side. Clark then set his fence on top of this dirt. This served as a barrier to protect Raleigh from the water above, and collect it in the ditches. Things went along very smoothly under this agreement for a number of years. Finally Clark failed to keep the ditch clean-

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ed out across Raleigh's land, which took the water to the creek; and, when this ditch filled up, the east and west ditches also filled. Raleigh then brought this suit for damages against Clark for the flooding of his land. Clark defended on the ground that Raleigh would not let him clean out the ditch on his land. He also pleaded limitations, alleging that the Mattingly ditch had existed for more than fifteen years, and was in existence when Raleigh bought the place. The proof on the trial showed very clearly that a large amount of water was run over Raleigh's land, and that considerable damage had been done his crop; but the jury, under instructions of the court, found for the defendant.

The instruction which is chiefly complained of is in these words: "If the jury believe from the evidence that the ditch leading from the Mattingly land over the defendant's land to plaintiff's land had been constructed and maintained continually for a period of fifteen years or more next before the contract or agreement between the plaintiff and defendant for a continuation of said ditch through the plaintiff's land to Knob Lick creek (if they believe from the evidence there was such an agreement), under a claim of right, then in that event the defendant is not liable to plaintiff for any damage that plaintiff may have sustained by water flowing through said ditch, though he failed to comply with the agreement to keep the ditch open on plaintiff's land." This instruction was erroneous. The contract between Clark and Raleigh was admitted by both parties. It had been carried out by them for a number of years. After getting the benefit of this contract, Clark must take it with the burden. He can not be permitted to say that he had a right to maintain the Mattingly ditch, for, whatever his rights may have been, he waived them, rather than take

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the chances of standing upon them; and after the lapse of many years, when necessarily the evidence as to whether the ditch was there by permission or as a matter of right has been obscured by time, he can not be allowed to go back now and insist upon a matter which he then deliberately waived. We understand the petition to be broad enough to recover for all water sent down upon Raleigh in violation of the agreement between Raleigh and Clark, by reason of Clark's failure to keep the ditch open as he agreed to do; and as, under this instruction, the verdict of the jury may, under the evidence, have been for Clark, without regard to the other matters in controversy, appellant is entitled to a new trial.

As the case must go back for another trial, it is necessary for us to determine whether instruction No. 3, which is objected to, properly defines the measure of damages, for it is to the interest of the parties that on the next trial the case may be fairly submitted to the jury. The thing complained of here is Clark's failure to comply with his agreement and keep open the north and south ditch; also the east and west ditch, which he dug on his own land. The rule is elementary that a party suing for damages from the breach of a contract can only recover such damages as naturally and proximately flow from the breach. When Clark failed to keep open the ditch across Raleigh's land, Raleigh might have opened it, and recovered the cost of doing the work which Clark had agreed to do, but had not done. The measure of damages for the non-performance of work of this sort is ordinarily the cost of the work, and not the loss which may result to the other party as a consequence of the work's not being done. Thus in *Miller v. Trustees*, 7 Greenl., 51, 20 Am. Dec., 341, the court

said: "The purchaser of perishable goods at auction fails to complete his contract. What shall be done? Shall the auctioneer leave the goods to perish, and throw the whole loss upon the purchaser? That would be to aggravate it unreasonably and unnecessarily. It is his duty to sell them a second time, and, if they bring less, he may recover the difference, with commissions, and other expenses of resale, from the first purchaser. If the party entitled to the benefit of a contract can protect himself from a loss arising from a breach, at a trifling expense, or with reasonable exertions, he fails in social duty if he omits to do so, regardless of the increased amount of damages for which he may intend to hold the other contracting party liable. '*Qui non prohibet, cum prohibere possit, jubet.*' And he who has it in his power to prevent an injury to his neighbor, and does not exercise it, is often in a moral, if not in a legal, point of view, accountable for it. The law will not permit him to throw a loss resulting from a damage to himself upon another, arising from causes for which the latter may be responsible, which the party sustaining the damage might, by common prudence, have prevented. For example, a party contracts for a quantity of bricks to build a house, to be delivered at a given time, and engages masons and carpenters to go on with the work. The bricks are not delivered. If other bricks of an equal quality, and for stipulated price, can at once be purchased on the spot, it would be unreasonable, by neglecting to make the purchase, to claim and receive of the delinquent party damages for the workmen, and the amount of rent which might be obtained for the house if it had been built. The party who is not chargeable with a violation of his contract should do the best he can in such cases, and for any unavoidable loss occasioned by the failure of the other he

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is justly entitled to a liberal and complete indemnity." In 1 Suth. Dam. (2d Ed.) section 88, it is said: "When, after a contract has been entered into between two parties, notice is given by one of them that the contract is rescinded on his part, he is liable for such damages and loss only as the other party has suffered by reason of such rescinding; and it is the duty of such other party, upon receiving such notice, to save the former, as far as it is in his power, all further damages, though the performance of his duty may call for affirmative action. If a person hired for service for a given term is wrongfully dismissed, he is entitled to the stipulated wages for the term of his engagement, if that is his loss. It is *prima facie* his loss, but the law imposes on him the duty to seek other employment, and to the extent that he obtains it, and earns wages, or might have done so, his damages will be reduced. See *Lewis v. Scott*, 95 Ky., 484 (16 R., 49) 26 S. W., 192, 44 Am. St. Rep., 251. In an action for damages resulting from alleged defects in the construction of the building so that the roof leaked and injured the interior work or property therein, or for breach of a contract to repair a building from which similar injuries ensued, or for injury to crops through default of the defendant in not building or repairing a fence, or his tortious opening of the same, where the party suffering from the injury is aware of the fact and the cause, and by a little timely labor and expense the damage could be avoided, the law imposes the duty on him to stay the injury, when he is in a favorable situation to do it, and enforces the duty by confining his redress for the injury thus avoidable to compensation for the necessary and proper means of prevention. The duty in such cases is not arbitrarily imposed on the injured party and exacted of him in all cases, to do or amend the work of the other

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party, or to finish it, but only when, in view of all the circumstances of the particular case, it is a reasonable duty, which he ought to perform, instead of passively allowing a greater damage." In 1 Sedgwick on Damages, the rule is similarly stated: "The same principle which refuses to take into consideration any but the direct consequences of the illegal act is applied to limit the damages where the plaintiff, by using reasonable precaution, could have reduced them." Section 201. "It is frequently said that it is the duty of the plaintiff to reduce the damages as far as possible. It is more correct to say that by consequences, which the plaintiff acting as prudent men ordinarily do can avoid, he is not legally damaged. Such consequences can hardly be the direct or natural consequence of the defendant's wrong, since it is at the plaintiff's option to suffer them. They are really excluded from the recovery as remote." Section 202. In subsequent sections it is pointed out that the law requires of the party injured only ordinary care, and that he is not required to commit a trespass or go on the plaintiff's land. Sections 221, 225. The authorities on the subject, as applied to a case like that before us, seem uniform.

By the third instruction the court, in substance, told the jury that, if they found for the plaintiff the criterion of damages was the value of the crops lost by him by reason of the flooding of the land, or a fair compensation for the injury to the crops, and the depreciation of the rental value of the land that was not in crop. The court should have modified this instruction to the effect that Raleigh could not recover for any damages which he might have avoided by ordinary care, and that for Clark's failure to keep open the north and south ditch on Raleigh's land the meas-

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ure of damages would be the reasonable cost of opening the ditch, and keeping it open, in so far as Raleigh might, by cleaning out the ditch, have avoided the damages complained of.

Judgment reversed, and cause remanded for a new trial.

CASE 85—ACTION BY JAMES CONLEY AGAINST JAMES E. ANGLIN TO SET ASIDE AN ALLEGED FRAUDULENT CONVEYANCE.—FEB. 6.

Anglin v. Conley.

APPEAL FROM CARTER CIRCUIT COURT.

JUDGMENT FOR DEFENDANT AND PLAINTIFF APPEALS. REVERSED.

FRAUDULENT CONVEYANCES—INTENT OF GRANTOR—KNOWLEDGE OF GRANTEE—CHANGE OF POSSESSION—DEED CONSTRUED AS MORTGAGE—PETITION—SEVERAL CAUSES OF ACTION.

- Held: 1. A petition to set aside an alleged fraudulent conveyance did not contain two causes of action by alleging that the conveyance was voluntary, and also that it was made with a fraudulent intent to cheat the grantor's creditors.
2. Where plaintiff had a claim for unliquidated damages against defendant for assault and battery at the time of a conveyance by defendant, plaintiff was a creditor, and as such entitled to sue to have the conveyance set aside as fraudulent.
3. Defendant committed an assault on plaintiff by shooting him, and immediately obtained \$500 from his brother to escape arrest, on the understanding that he would convey to his brother his interest in certain land. Defendant thereafter was arrested, whereupon the deed was executed and recorded, and thereafter the brother advanced other funds to pay for defendant's defense. There was no evidence that either defendant or his brother was aware that plaintiff had a cause of action against defendant for the injuries inflicted at the time of the conveyance, or that it was made with any other intent than to raise money with which to enable defendant to escape arrest. Held, that plaintiff, after recovering judgment in an action for

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his injuries, was not entitled to have the conveyance set aside as executed with intent to defraud the grantor's creditors.

4. Where land was conveyed by defendant to his brother, the fact that there was no change in possession, but that defendant, his brother, and his grandmother continued to reside on a part of the land so conveyed, did not justify a finding that the conveyance was fraudulent as to the grantor's creditors.
5. Where it was agreed that defendant should convey certain land to his brother in consideration of \$500 advanced to enable defendant to escape arrest for an assault, and after defendant returned and was arrested the brother advanced other moneys for defendant's defense in consideration of the conveyance, but the exact amount to be advanced was not agreed on by the parties, the conveyance should be treated as a mortgage to secure such advances as against a judgment for damages sustained by such assault.

THEOBALD & THEOBALD AND C. B. WILHOIT, FOR APPELLANT.

G. W. ARMSTRONG, H. L. WOODS AND R. D. DAVIS, FOR APPELLEE.

(No briefs.)

OPINION OF THE COURT BY JUDGE PAYNTER—REVERSING.

The object of this suit was to set aside a deed which Talton B. Anglin executed and delivered to the appellant, James E. Anglin, by which he conveyed to him an undivided fifth interest in a certain tract of land, the appellee claiming that at the time of its conveyance he was a creditor of the grantor. The deed was dated July 10th, was acknowledged on the 15th, and lodged for record on the 22d of the same month. The consideration recited in the deed was \$500 cash in hand paid and love and affection, the grantor and the grantee being brothers. From the averments of the petition it appears that on the 4th day of July, 1896, the grantor, Talton B. Anglin, shot and wounded the appellee, Conley; that on the 30th day of that month the appellee instituted an action against him for maliciously shooting and wounding him; that sub-

sequently he recovered a judgment against him for \$850 and costs; that on the 14th day of August, 1898, this action was instituted in equity for the purpose heretofore stated. It is averred in the petition that the conveyance was made by the grantor to the grantee for the purpose of hindering and delaying the grantor's creditors in the collection of their debts, and that it was made without any good or valuable consideration. The appellant moved the court to compel the appellee to paragraph his petition, upon the idea that it stated two causes of action: (1) Because it was averred the grantor executed it with fraudulent intent to cheat his creditors; (2) because it was averred that the deed was made without consideration, hence a voluntary conveyance.

To paraphrase the averments of the petition, they simply amount to the charge that it was a voluntary conveyance, without consideration, with the fraudulent intent to cheat the grantor's creditors. In our opinion, there is but one cause of action attempted to be stated. The first question which we will consider is whether or not the appellee was a creditor of Talton B. Anglin at the time the conveyance was made, or had such claim as would enable him to have the conveyance set aside upon a proper showing. It is urged in behalf of the appellant that the appellee was not a creditor of the grantor, because the liability had not been fixed by a judgment of the court. It was held in *Lillard v. McGee*, 4 Bibb, 165, that a person who recovers judgment in slander is a creditor, within the meaning of the statute. In *Slater v. Sherman*, 5 Bush, 206, it was held that one who had a claim against another, growing out of assault and battery, had the right to have a fraudulent conveyance set aside, although made before the judgment was rendered in his favor. The doctrine in

those cases settles the question here that the appellee was a creditor of the grantor. The facts are about these: The appellant knew of the assault which his brother had made upon the appellee. The brother intended to evade prosecution by leaving the State, and obtained from the appellant \$500, with the understanding that he was subsequently to convey to him his interest in the land, which was afterwards done by the deed in question. Before that was consummated, the grantor returned to Kentucky, and either surrendered himself or was arrested. The deed seems to have been drawn on that day, but not acknowledged until five days thereafter, and recorded at the time heretofore stated. The appellant knew the purpose which his brother had in view in obtaining the \$500, which was to evade, for a time at least, a prosecution by the Commonwealth. After the grantor placed himself, or had been placed, in the custody of the law, the transaction was consummated by the execution of the deed. There is no evidence in the record that either the grantee or the grantor was aware of the fact that the appellee had a cause of action against the grantor for the injury which he had inflicted upon him, so that at the time the \$500 was furnished it is certain that the only purpose to be accomplished was the evasion of prosecution by the Commonwealth. Although the action of the appellant might have facilitated the grantor's effort to evade such prosecution, that unlawful act could not inure to the benefit of the appellee in this action. The rights of the appellee must be determined from the facts, independent of the unlawful act of the appellant, if it was so, to show a willingness to facilitate the escape of his brother from a penal or criminal prosecution. The deed recites a payment of \$500 by the appellant. The grantor and the appellant were introduced

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as witnesses by the appellee, and they both testified that \$500 was paid, and that, after the grantor was in custody of the officers of the law, they made an additional agreement, before the deed was delivered, as to the consideration for the conveyance, to the effect that the appellant was to furnish money to pay the grantor's attorneys, the cost in defense of the prosecution, and any fine that might be recovered against him. They stand uncontradicted upon these questions. The proof shows that the sums paid to lawyers, etc., amounted to about \$1,200, in addition to the \$500 which had already been paid. The mere fact that appellant knew that the grantor had assaulted the appellee did not charge him with notice that a cause of action existed in his favor against the grantor, or that the grantor was making the conveyance with a fraudulent intent to evade the payment of such judgment as might be recovered thereon. If the grantor had a fraudulent intent in making the conveyance to cheat the appellee, that fact would not deprive the appellant of his right to assert his claim against the land for the sums paid for the consideration in the purchase of it, unless he actually had knowledge of the fraudulent intent. The appellant and his brother seem to have lived together with their grandmother on a part of the land which was conveyed, and they continued to so live after the conveyance; but this fact will not justify a court in treating the conveyance as fraudulent, and this court has frequently so held. Under all the circumstances, we are of the opinion that, as the exact amount which was to be paid for the land could not be told, and was not agreed upon, the deed should be considered as a mortgage to secure whatever sums of money the appellant paid the grantor, and for him on account of the prosecution. As the appellee did not file a petition

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in equity before he obtained his judgment, this is no case for the application of section 1907a, Kentucky Statutes.

The case is reversed, with directions that the court adjudge the appellant a lien upon the land for the sums he paid to and for his brother, Talton B. Anglin, as consideration for the land, which is the \$500 and the amounts paid the attorneys, costs, and fines; that the appellee be awarded a lien for his debt, interest, and costs, subordinate to that of the appellant; and that the interest conveyed by Talton B. Anglin in the property be sold to satisfy these claims; and for proceedings consistent with this opinion.

CASE 86—ACTION BY W. E. LOGSDON AGAINST L. & N. R. R. Co.
FOR PERSONAL INJURIES.—FEB. 10.

Louisville & N. R. R. Co. v. Logsdon.

APPEAL FROM HART CIRCUIT COURT.

JUDGMENT FOR PLAINTIFF AND DEFENDANT APPEALS. REVERSED.

RAILROADS—LICENSEE—INJURY—MEASURE OF DAMAGES—DEFINITION
OF NEGLIGENCE—ORDINARY CARE—GROSS NEGLIGENCE—SUBMIS-
SION OF TO JURY—COMPENSATION FOR INJURIES.

Held: 1. In a personal injury case, it is error to instruct that the jury should consider the time plaintiff has lost or may lose, the pain he has endured or may endure, and the disability to labor and enjoy life which he has suffered or may suffer from the injuries, and the expense incurred or which may be incurred in the treatment of the injuries; the proper elements of damage being the reasonable expense of cure, including any expense reasonably certain to be afterwards necessarily incurred, the fair value of the time lost or which he is reasonably certain may be lost, and a fair compensation for the physical and mental suffering endured or which it is reasonably certain will be endured, and any permanent reduction of earning power.

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2. Having defined "negligence" as meaning the failure to use ordinary care, it is proper to state in another instruction that, if the jury believed defendant "negligently" pushed one of its cars against the one in which plaintiff, a licensee, was, etc., they should find for plaintiff.
3. Ordinary care is such care as a man of ordinary prudence might reasonably be expected to exercise under like circumstances.
4. At the request of his father, plaintiff was loading a timber car on a side track, which the father had secured from defendant railroad company. Defendant's freight train pulled in on the main line, about opposite the lumber car, which was in plain view of the trainmen, and the engine went up to the switch with a flat car loaded with rock, and sent it down on the side track. A brakeman on the rock car undertook to stop it before it reached the lumber car, but failed to do so, and in the ensuing collision plaintiff was injured. **HELD**, that the question of gross negligence was properly submitted to the jury.

B. D. WARFIELD, FOR APPELLANT.

J. A. MITCHELL, OF COUNSEL.

CLASSIFICATION OF POINTS DISCUSSED.

1. Many of the remarkable averments of the petition are either positively disproved by, or fail to be supported by, the evidence.

2. The evidence substantially stated and analyzed.

3. The court erred in permitting appellee to prove rules 117a, 117b, and 203 of appellant's book of rules, for the reason that the rules were wholly inapplicable to and contradictory of the point on which they were offered. And, in this same connection, the court erred in refusing appellant's request to give instruction "D," offered for the purpose of neutralizing, as far as possible, the error of the court in permitting said rules to be proven over appellant's objection.

4. The court erred in giving instructions Nos. 1, 2, 3, 4, 5 and 6 asked by appellee.

5. Objection 1 was objectionable (a) in giving prominence to certain parts of the evidence, a practice upon which this court has animadverted in many cases. *C. & O. Ry. Co. v. Judd's Admr.*, 20 Ky. Law Rep., 1978; *Ky. Tobacco Association v. Ashley*, 5 Ky. Law Rep., 184; *Comth. v. Hourigan*, 89 Ky., 305; *Flood v. Pragoff*, 79 Ky., 607; *Jones v. Jones*, 19 Ky. Law Rep., 1516. (b) It was also objectionable in that it did not define the word "negligently," as used therein; (c) it

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is objectionable that it does not give to the jury the criterion of compensatory damages, and permits the jury to consider other elements than those which this court has held enter into the estimation of compensatory damages; *N. N. & M. V. Co. v. Walker*, 14 Ky. Law Rep., 175; *Muldraugh's Hill, C. & C. T. P. Co. v. Maupin*, 79 Ky., 101; *C. P. R. R. Co. v. Kuhn*, 86 Ky., 578; *Parker v. Jenkins*, 3 Bush, 560; *K. C. R. R. Co. v. Ackley*, 87 Ky., 278; *Standard Oil Co. v. Tierney*, 96 Ky., 89; (d) it is objectionable in that it does not limit the jury as to any lost time or suffering appellee may endure in the future to such as it is reasonably certain under the proof will result; *L. S. R. R. Co. v. Minogue*, 90 Ky., 369; (e) it is objectionable in that it permits the jury, among other things, to give appellee damages for "the disability to labor, move about, and enjoy life," none of which are proper elements of damage. The impairment of his power to earn money, if any, would be an element of damage, but in no state of case would his disability to "move about and enjoy life" be an element of damage; (f) it is objectionable in that it authorized a recovery for expenses incurred, or which may hereafter be incurred, when there is not the slightest evidence as to what if any expenses have been incurred, or as to any probability of any expenses being incurred in the future; (g) it is objectionable in leaving out of the view of the jury altogether the contributory negligence, if any, of appellee, and in not referring to any other instruction as necessary to be read by the jury in connection with instruction No. 1, on this point. *Carter v. Howard*, 11 Ky. Law Rep., 443; *Culbertson v. McCullom*, 1 Ky. Law Rep., 267.

6. Instruction No. 2 was objectionable for the same reason pointed out as to instruction No. 1, in giving undue prominence to part of the evidence; and in submitting to the jury a wholly immaterial and prejudicial issue.

7. Instructions Nos. 3 and 4, are expressed in inapt language and are therefore misleading. *Needham v. L. & N. R. R. Co.*, 85 Ky., 123.

8. Instruction No. 5 is erroneous in that (a) it gives the jury no criterion by which to measure the "actual damages;" (b) it does not limit the future damages to such as are reasonably certain under the proof to accrue; (c) it authorizes punitive damages which are not warranted by the proof in this case. *L. & N. R. R. Co. v. Bell*, 100 Ky., 203; *L. & N. R. R. Co. v. Bernard*, 18 Ky. Law Rep., 672; *L. & N. R. R. Co. v. Law*, 14 Ky. Law Rep., 850; *Standard Oil*

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Co. v. Tierney, 96 Ky., 89; Creighton and Stock Cases, 20 Ky. Law Rep., 1691.

9. Instruction No. 6 is wholly improper and erroneous because there was not the slightest evidence on which to base it. It wrongfully submitted to the jury an issue which there was no proof to sustain.

10. The proof shows appellee to have been guilty of contributory negligence; this issue was not properly submitted to the jury. P. & M. R. R. Co. v. Hoebl, 12 Bush, 41; K. C. R. Co. v. Thomas' Admr., 79 Ky., 160.

11. The instructions were inconsistent and therefore worse than none. Clay's Heirs v. Miller, 3 Mon., 146; Tate v. Parrish, 7 Mon., 325; Carter v. Howard, 11 Ky. Law Rep., 443; Gaines v. Buford, 1 Dana, 502; Eisfelder v. Klein, 5 Ky. Law Rep., 138; Finch v. Shackelford, 7 Ky. Law Rep., 606; L. & N. R. R. Co. v. Murphy, 6 Ky. Law Rep., 662; K. C. Ry. Co. v. Martin, 12 Ky. Law Rep., 717.

12. The damages are grossly excessive, appearing to have been given under the influence of passion or prejudice. Louisville Water Co. v. Upton, 18 Ky. Law Rep., 326; L. & N. R. Co. v. Lowe, decided Feb. 19, 1902; S. C. & C. S. R. Co. v. Ware, 84 Ky., 267; L. S. R. Co. v. Minogue, 90 Ky., 369; L. & N. R. Co. v. Foley, 94 Ky., 220; L. & N. R. Co. v. Law, 14 Ky. Law Rep., 850; L. & N. R. Co. v. Survant, 96 Ky., 197; Civil Code, sec. 340.

S. M. PAYTON & W. S. PRYOR, FOR APPELLEE.

Appellee, a young man, twenty-two years of age, capable of earning from two to five dollars a day, while engaged with his father in loading a car on appellant's track, with lumber, was injured by the negligence of the appellant's servants in running a heavy loaded train of cars against the one in which appellee was working, causing the lumber in the car in which he was, to fall over on him and inflict an injury by breaking his ankle bone, that not only caused him great bodily pain, but made him a cripple for life.

He was at the time helping his father load said car with heavy lumber for shipment on appellant's railroad and the car he was loading was standing on appellant's switch, and he was therefore a licensee. His father saw the danger and jumped from the car and escaped injury, but appellee did not know of the approach of the train until it struck the car he was in and caused the lumber to fall over on him and injure him.

We contend that he was not guilty of contributory negli-

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gence in failing to jump from the car in which he was working, even if he had known the ballast train was approaching, and if he had jumped and been injured, appellant would have claimed that that would have been contributory neglect, and that if he had remained in the car he would not have been injured. He suffered for seven or eight weeks, both day and night, having his foot swung to a staple in the ceiling to ease his pain.

We contend that the instructions given by the court, defining damages by way of compensation, were correct and were approved by this court in *L. & N. R. R. Co. v. Mitchell*, 10 Rep., 211, and under the evidence we claim that it was the province of the jury to award punitive damages.

AUTHORITIES CITED.

L. & N. R. R. Co. v. Mitchell, 10 R., 211; *Loeser v. Axter*, 12 Rep., 676; *L. & N. R. R. Co. v. Turner*, 12 R., 606; *L. & N. R. R. Co. v. Mitchell*, 87 Ky., 327; 11 Bush, 509; *L. & N. R. R. Co. v. Connelly*, 9 R., 993; *Alexander v. L. & N. R. R. Co.* 83 Ky., 589; *L. & N. R. R. Co. v. Minogue*, 90 Ky.; *L. & N. R. R. Co. v. Foley*, 94 Ky, 220; *Ky. Central v. Smith*, 14 R., 455; *Ky. Cent. v. Ryle*, 13 R., 862; *L. & N. R. R. Co. v. Popp*, 16 R.; *L. & N. R. R. Co. v. Greer*, 16 R., 667; *L. & N. R. R. Co. v. Sheets*, 11 R., 781; *Beaumeister & Bro. v. Markham*, 19 R., 309; *L. H. & S. L. v. Lyon*, 22 R., 544; *C. & O. Ry. Co. v. Davis, &c.*, 22 R., 1156; *So. Ry. Co. v. Cooper*, 23 R., 290; *L. & N. R. R. Co. v. Caruthers*, 23 R., 1673; *Western Union v. Engler*, 21 C. C. A., 246; *Shumacker v. St. L. & S. F. Ry. Co.*, 39 Fed., R., 174; *Osborne v. City of Detroit*, 32 Fed. R., 36; *Illinois Central v. Davidson*, 76 Fed. R., 517; *Brown v. Evans*, 17 Fed. Rep., 912; *L. & N. R. R. Co. v. Penrod's Admr.*, 23 R.; *Press Pub. Co. v. Monroe*, 19 C. C. A.; *Wilson v. Vaughn*, 23 Fed. Rep., 229.

OPINION OF THE COURT BY JUDGE HOBSON—REVERSING.

Appellee, Logsdon, who is twenty-two years of age, was helping his father load a car with lumber at Munfordville, Ky., in April, 1901, on a side track of appellant's road at that point. While they were in the car, loading it, a freight train pulled in on the main line about opposite to them. The engine then went up to the switch with a flat car loaded with rock, and sent it down on the side

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track on which the car stood in which they were working. A brakeman was on the rock car, and undertook to stop it before it reached the car in which they were working; but, either from the force with which it was sent in, or its weight, or the fault of the brake or of the brakeman, the car was not stopped, and collided with the other car with great force. The brakeman jumped off just before the collision. Appellee's father also jumped off their car, and called to appellee to jump, but he did not understand, and, before he could get out, the collision occurred, jamming the lumber against his ankle, breaking one of the bones, and painfully injuring it. The freight car had been set there by the company for them to load, and the trainmen saw it there before they jerked the rock car in. By "jerkng a car in" is meant giving it a jerk with the engine, and letting it run without the engine being attached to it. The jury found for appellee, and fixed his damages at \$8,000.

Instruction 1 given by the court is in these words: "If you shall believe from the evidence that the plaintiff came upon the premises of the defendant at the request of his father, and at his request engaged in loading a car with lumber that had been engaged by his father from the defendant for the shipment of his lumber over the road of the defendant, and that while plaintiff was so there and so engaged the defendant, its agents or employes, in control and management of its engine and cars, did negligently push, shove, or throw one of its said cars against the one which had been let to his father, and in which plaintiff was located in loading said car, if he was so located, and thereby catch and injure him in said lumber and car, you should find for the plaintiff the damages which he sustained thereby, taking into your consideration the time he has lost

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or may hereafter lose, if any; the pain and suffering he has endured or may hereafter endure, if any; the disability to labor, move about, and enjoy life which he has suffered or may hereafter suffer, if any; directly resulting to him from said injuries, and the expense he has incurred or may hereafter necessarily incur, if any, in the treatment of his said injuries, not to exceed in all the amount sued for herein, which is \$20,000." This instruction did not correctly define the measure of damages. In *L. C. & L. Railroad v. Case's Admr.*, 72 Ky., 736, this court said: "The term 'compensation,' when applied to damages, has a fixed legal signification much more restricted than its common or general acceptance. In actions for personal injuries where death does not ensue, it is confined to the expense of cure, the value of time lost, a fair compensation for the physical and mental suffering caused by the injury, and for any permanent reduction of the power to earn money." This was followed in *L. & N. Railroad v. Fox*, 74 Ky., 509; *Muldraugh's Hill, etc., Turnpike Co. v. Maupin*, 79 Ky., 101, (1 R., 404) *Kentucky Central Railroad v. Ackley*, 87 Ky., 278 (10 R., 170), 8 S. W., 691, 12 Am. St. Rep., 480; *Standard Oil Co. v. Tierney*, 92 Ky., 367 (13 R., 626), 17 S. W., 1025, 14 L. R. A., 677, 36 Am. St. Rep., 595; and many subsequent cases. The authorities elsewhere are uniform to the same effect. 2 *Shearman & Redfield on Negligence*, 758. The case of *L. & N. Railroad v. Mitchell*, 87 Ky., 327 (10 R., 211), 8 S. W., 706, does not conflict with this rule, as the question was not considered there by the court, or, so far as appears, made by counsel. The case went off on other grounds. The court here should have told the jury that, if they found for the plaintiff, the measure of damages was the reasonable expenses of his cure, including any expense that it was reasonably cer-

tain he would thereafter necessarily incur; the fair value of the time lost by him, or which it was reasonably certain he would thereafter lose; and a fair compensation for the physical and mental suffering endured by him, or which it was reasonably certain he would endure; as well as for any permanent reduction of his power to earn money by reason of his injuries.

The court defined the word "negligence" as meaning the failure to use ordinary care, and with this definition we see no objection to the use of the word "negligently" in this instruction. The question of contributory negligence was aptly submitted to the jury by another instruction. The definition of "ordinary care" should have been "such care as a man of ordinary prudence might reasonably be expected to exercise under like circumstances." The question of gross negligence was properly left to the jury under the evidence, in view of the violence of the collision and the fact that the car was jerked in by the crew with the knowledge that the other car in which the men were working was standing on the side track, and so near the switch.

Rules 117a and 117b should not have been read to the jury, as they do not illustrate anything in the case. Rule 203 was properly allowed to be read.

Judgment reversed, and cause remanded for a new trial.

Metropolitan Life Ins. Co., &c. v. Miller.

CASE 87—ACTION BY WILLIAM L. MILLER AGAINST METROPOLITAN LIFE INSURANCE COMPANY, &c. FOR MALICIOUS PROSECUTION.—
FEB. 10.

Metropolitan Life Ins. Co., &c. v. Miller.

APPEAL FROM M'CRACKEN CIRCUIT COURT.

JUDGMENT FOR PLAINTIFF AND DEFENDANTS APPEAL. REVERSED.

MALICIOUS PROSECUTION—PROBABLE CAUSE—QUESTION FOR COURT—
INSTRUCTIONS—MALICE.

- Held: 1. What facts are sufficient to constitute probable cause, in an action for malicious prosecution, is a question of law, for the court.
2. Where, in an action for malicious prosecution, it was clearly proved that plaintiff had collected money for defendant insurance company, and had not charged himself with it or accounted therefor, and had failed to make good the amount after the default was discovered, it was error to fail to charge that, if the jury believed such facts, then there was probable cause for plaintiff's arrest, and they should find for defendant.
3. In an action for malicious prosecution, plaintiff must prove malice in fact, which is an evil or unlawful purpose in causing plaintiff's arrest, as distinguished from a motive to promote justice.
- J. D. MOCQUOT AND JAMES CAMPBELL, ATTORNEYS FOR APPELLANTS.

Appellee, Miller, was agent for the appellant, Metropolitan Life Insurance Company, and the National Surety Company was surety on his bond as such agent. A. C. Willi and J. K. Grief were officers of said life insurance company. Appellee was entitled to a certain commission on all the business he solicited for the company. After he quit the employment of the company it was ascertained that he had failed to account for some collections that he had made to the amount of \$18.30 and probably more which he refused to pay. Upon consultation between the life insurance company, the National Surety Company officers, Willi and Grief, with attorney Mocquot, it was decided under the advice of said attorney to take out a warrant against Miller for embezzlement. The war-

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rant was obtained and upon a hearing before the examining court, the county attorney not being present, the case was dismissed without a hearing, and the appellee then brought this suit against all the parties for damages, resulting in a judgment for the plaintiff for \$1,800 against the insurance company, the surety company and officers, Willi and Griet, from which judgment this appeal is prosecuted.

The reasons urged for a reversal may be generally stated under three heads:

1. Refusal of the court to peremptorily instruct the jury to find for the defendants upon their motion.

2. Error in the admission of testimony.

3. Error of the court in instructing the jury on the trial and refusal to give proper instructions.

(1) We claim that in proceedings in these cases the liability of the prosecuting witness depends not upon the guilt or innocence of the plaintiff, but whether or not the defendant acted upon probable cause and without malice.

(2) That when a defendant shows facts to have existed, known to him, which would lead a person of ordinary intelligence to believe a crime had been committed, or when he consults a competent attorney, laying before him all the facts which he knew or could by ordinary diligence have ascertained, and is advised by said attorney that the crime has been committed, and acts upon the facts within his knowledge and upon the advice of the attorney, he has made out a case of probable cause.

(3) In this case there being no dispute as to the facts as to what information the prosecuting witness acted upon; no dispute as to the consultation with attorney Mocquot and the county attorney; no testimony showing bad faith in seeking legal advice, or that it was unfairly sought or acted on, we insist that the court should have applied the law and charged the jury peremptorily as asked.

(4) The instructions given to the jury by the court do not properly define probable cause. The jury are not told that Willi and the other defendants could have acted upon facts which would induce a person of ordinary prudence to believe Miller guilty of the charge, or that Willi could have acted upon facts which came to his knowledge from sources other than his own notice.

AUTHORITIES CITED.

Meyer v. L., St. L. & T. Ry. Co., 17 R., 945; Davis v. Cassidy, 23 R., 955; Mark & Muse v. Christian, 22 R., 1103; Ahrens & Ott Mfg. Co. v. Hoher, 21 R., 299; Moore v. Large,

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20 R., 409; Branham v. Berry, 4 R., 357, 412; Redman v. Stowers, 11 R., 429; Rives v. Wood, 12 R., 692; Lancaster v. Langston, 18 R., 299; Alexander v. Reid, 19 R., 1636; Faris v. Starkle, 3 B. Monroe, 4; 1 Greenleaf on Evidence, sec. 577, p. 722.

HENDRICK & MILLER, FOR APPELLEE.

POINTS DISCUSSED.

1. Case stated.

2. In action for malicious prosecution, it is proper to charge conspiracy and confederation to coerce wrongfully and fraudulently the payment of a pretended and unjust claim by use of criminal process; such an effort being at common law an unlawful act, and made such by Kentucky Statutes, section 1241, subsection 1, and section 1341.

(a) Such conspiracy furnishes grounds for an action "on the case," besides being commonly pleaded in actions for malicious prosecution as showing aggravation.

(b) Necessary and proper where advice of counsel is claimed as ground or probable cause for the prosecution.

(c) And especially when the attorney is an alleged co-conspirator.

(d) And if not proper in petition, it certainly would be in reply to answer pleading the privilege of an attorney.

(e) Where a conspiracy is shown, each conspirator is liable for the acts of co-conspirators, and admissions or confessions of one may be shown in evidence against all. Metcalfe, &c. v. Connor, &c., Littell's Select Cases, 497; Mott v. Danforth, 31 American Decisions, 468 and 6 Watts, 304; Adams v. Page, 7 Pick., 542; Smith v. Nippert, 76 Wis., 86, and 20 Amer. St. R., 26; Davenport v. Lynch, 6 Jones (N. C.), 340; Kimball v. Horton, 6 Am. Rep., 340; Christian v. Commonwealth, 13 Bush, 264; Commonwealth v. Webster, 56 Am. Dec., 711 (famous case); Shotwell v. Commonwealth, 23 Ky. Law Rep., 1649; Wood v. Weir, &c., 5 B. Monroe, 542.

3. The court did not err in overruling the motions of appellants for peremptory instructions and for new trial, evidence being abundant to show that all four of the appellants, with their attorney, the defendant, Mocquot, to whom a new trial was granted, actively engaged in bringing about the prosecution of plaintiff, in order to force him to pay a pretended claim then in the hands of Mocquot, and to set an example to the other agents of the insurance company, that they must comply with the rule of the company to be responsible for what is known as "excessive arrears," due from policyholders who had

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failed to pay; the parties all making a mere feint and pretense of prosecution, and dropping and abandoning same as soon as it was discovered that plaintiff would not pay, but would contest the point and make his defense; the defendants below first bitterly denying that they were engaged or concerned in the prosecution, but when same was proved then admitting they did it, and claiming they were justified in so doing.

4. Witness may swear to handwriting of one, though he never saw the party actually write, if the witness has personal knowledge of the party's handwriting, "by having seen writings purporting to be his and afterward admitted by him, or with his knowledge and acquiescence acted on as his, or adopted into the ordinary transactions of life as his." In this case, the witness being the agent and correspondent of the company in Paducah, and the person writing the letters being the secretary of the said company and carrying on a large correspondence with the witness, exchanging letters, and sending checks to witness, which were cashed and no complaint afterwards made. *Hawkins v. Grimes*, 13 B. Monroe, 264; *Fee v. Taylor*, 83 Ky., 259; 1st Greenleaf on Evidence, sec. 577.

5. Witness may be required to answer any question tending to degrade him, not showing him guilty of any crime for which he could be afterwards convicted. *Mitchell v. Commonwealth*, 12 Ky. Law Rep., 418; *McC Campbell v. McC Campbell*, 21 Ky. Law Rep., 552-554; 1st Greenleaf on Evidence, 15th ed., sec. 454.

6. Letter having been written, stamped and mailed in a United States postoffice to appellant's address in New York, it is presumed to have been received by appellant. *Shields v. Lewis*, 20 Ky. Law Rep., 1601.

7. Instructions were more favorable to appellants than they had a right to expect; and having objected to an instruction upon one point offered by appellee and said objection having been sustained by the court, appellants can not complain that a similar instruction offered by them was refused.

OPINION OF THE COURT BY JUDGE HOBSON—REVERSING.

Appellee, Miller, was agent for appellant Metropolitan Life Insurance Company, and appellant the National Surety Company was surety on his bond. It was the duty of Miller to pay over to the company weekly all the money he collected, and his commissions were paid back to him

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by the company, from the home office a few days later. The mode of doing the business was to collect the premiums from the policyholder weekly. The policyholder had a book, and in this his weekly payments were entered by the agent when made. The agent had a similar book, in which the payments were also entered, and he settled weekly with the superintendent by his book. Once in three months the agent's book was compared with the policyholders' books, to see if he had accounted to the company on his book for all the money that he had collected, as shown by the policyholders's books. Miller left the service of the company in December, 1899. The superintendent then went around with Miller, comparing his book with the policyholders' books, and found that Miller had not entered on his book some collections he had made, amounting to \$9.34, and Miller executed to the company his due bill for the amount. Subsequent investigation showed that he was behind in a larger amount, and, while he says that he did not agree as to the correctness of the settlement, the weight of the evidence is the other way. Still he paid nothing, and on January 25, 1900, his surety in his bond, the National Surety Company wrote him a letter, telling him that it had paid the insurance company \$15.58 for a shortage in his account, and calling on him to reimburse it. To this letter he made no reply. On February 20th the surety company again wrote him in regard to the shortage it had paid, and to this letter he made no reply. The agents of the insurance company had some interviews with him near this time about settling the remainder of the shortage, but nothing came of it. Things ran along for some months, and then, at the request of the surety company, the insurance company directed its agent to institute a criminal proceeding against Miller for

embezzlement. A consultation was held with an attorney, and on his advice a warrant was issued on July 14, 1900. Miller was arrested under the warrant, remaining in custody about an hour before he gave bond. This was on Saturday. The case was called on Monday morning, and laid over until Thursday; one of the witnesses having left the State. On Thursday morning, before the county attorney reached the court house, the case was called again; and there being no witnesses present, and no one to prosecute, the case was dismissed. Miller then filed this suit to recover damages of the two corporations, and their agents taking the proceeding against him, on the ground that the prosecution was malicious and without probable cause. The jury found in favor of the plaintiff, and assessed the damages at \$1,800, and the defendants have appealed.

The court properly instructed the jury as to the advice of counsel, constituting probable cause, but he did not give any instruction on the probable cause outside of the advice of counsel. The rule is that what facts constitute probable cause is a question of law, for the court, and that the court must, by its instruction, inform the jury what these facts are, and let them determine from the evidence whether the facts exist, where the evidence is conflicting. *Anderson v. Columbia Finance & Trust Company* (20 R., 1790), 50 S. W., 40; *Ahrens & Ott Manufacturing Co. v. Hoeler* (106 Ky., 692) (21 R., 259), 51 S. W., 134.

Appellant was charged in the criminal proceeding with the crime of embezzlement, under section 1202, Kentucky Statutes, which provides, among other things, that if an agent of any corporation shall embezzle or fraudulently convert to his own use, or the use of another, any money, property, or effects of the corporation coming into his

hands, as such agent, he shall be confined in the penitentiary not less than one year nor more than ten years. Embezzlement is defined as the fraudulent appropriation or conversion of the property of another by one who is intrusted with the possession. 2 Bishop, Criminal Law, section 325 (2); 10 Am. & Eng. Ency. of Law, 978. The words, therefore, "embezzle and fraudulently convert," are synonymous. To constitute the offense, it is necessary there must be a criminal intent; but, where the money of the principal is knowingly used by the agent in violation of his duty, it is none the less embezzlement because at the time he intended to restore it. 10 Am. & Eng. Ency. of Law, 996, 997, and notes. The proof before the jury showed very clearly that Miller had collected the money of the insurance company, and had not charged himself with it or accounted for it, and had failed to make good the amount after the default was discovered. It is true, he testified that the balance against him did not arise in this way, but under the proof this was a question for the jury; and the court should have instructed them that if the agent or agents of the company in taking out the warrant believed, and had such grounds as would induce a man of ordinary prudence to believe, that Miller, while agent for the insurance company, had collected and received money belonging to the company, and had fraudulently kept the same, and had failed to pay it to the company or its authorized agent, then there was probable cause for taking out the warrant, and they should find for the defendant. The instructions of the court, as given to the jury gave them no light as to what constituted embezzlement or fraudulent conversion; and although the defendants may, in the judgment of the jury, have shown that they had reasonable cause to believe Miller in fact guilty, as above defined, the

jury were required by the instruction to find for the plaintiff.

Instruction "f" asked by the defendants is not as favorable to them as the law warrants, in that the definition of malice therein is not as favorable to the defendants as that established by the authorities elsewhere, and heretofore sanctioned by this court. In a proceeding of this kind, there must be malice in fact. This is not necessarily ill will to the defendant, but it is any evil or unlawful purpose, as distinguished from that of promoting justice. *Ahrens & Ott v. Hoehner*, supra. With this modification, instruction "f" should have been given, to the effect that there must be both malice and a want of probable cause, to justify a recovery, although, as a matter of fact, plaintiff was innocent of the charge. For the question in this case is not the guilt or innocence of Miller of the crime of embezzlement, but whether the defendants, at the time they took out the warrant, had probable cause to believe him guilty. If they had such cause, there can be no recovery, no matter how clearly the evidence may now show that Miller was innocent.

Judgment reversed and cause remanded with directions to grant appellants a new trial.

Petition for rehearing by appellee overruled.

CASE 88—ACTION BY THE CITY OF LOUISVILLE AGAINST D. F. MURPHY, ASSESSOR OF SAID CITY TO ENJOIN HIM FROM ASSESSING THE FRANCHISES OF CERTAIN PUBLIC SERVICE CORPORATIONS FOR TAXATION FOR CITY PURPOSES—FEB. 10.

Murphy v. City of Louisville.

APPEAL FROM JEFFERSON CIRCUIT COURT, COMMON PLEAS DIVISION.

JURGMET FOR PLAINTIFF AND DEFENDANT APPEALS. REVERSED.

TAXATION—ASSESSMENT—FRANCHISES—PUBLIC SERVICE CORPORATIONS—IMPLIED REPEAL OF STATUTES—ENACTMENT—TITLE.

- Held: 1. Act March 19, 1898, conferring on the city assessor of cities of the first and second classes authority to assess the franchises and intangible property of certain public service corporations, was not repealed by the general revenue act of 1902, which purports to be an amendment to the revenue law of 1892, as amended by twelve acts specifically enumerated in the title, not including the act of 1898, and providing that the assessment of the franchises, etc., of such corporations, shall be made by a board of valuation and assessment; and hence it was the duty of the assessor of the city of Louisville, a city of the first class, and not the board of valuation and assessment, to assess the franchises of such corporations within such city.
2. Act of 1898, entitled "An act concerning the assessment and valuation for taxation of corporate franchises and intangible property, by cities of the first and second class," was not objectionable as containing more than one subject, by reason of the fact that it applied to cities of different classes.
3. Act 1898, providing for the taxation by cities of the first and second classes of franchises of public service corporations, was not invalid on the ground that it attempted to revise, or amend the general law in regard to revenue, and did not contain a recital of the laws amended at length.

HUMPHREY, BURNETT & HUMPHREY AND HELM, BRUCE & HELM, FOR APPELLANT.

POINTS AND AUTHORITIES.

1. Repeals by implication are not favored, and where the Legislature has had its attention called to a particular subject and provided for it, the Legislature can not reasonably be

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presumed to intend to alter the special provision by a subsequent general enactment. Endlich on Interpretation of Statutes, sec. 223; Sedgwick on Statutory Construction, secs. 157, 158; Sutherland on Statutory Construction, sec. 157; Cope v. Cope, 137, U. S., 682; McChord v. L. & N. R. R. Co., 183 U. S., 483; Commonwealth v. Cain, 14 Bush, 583; Thorpe v. Adams, 1 L. R., 6, C. P., 135; Fitzgerald v. Champenys, 30 L. J. N. S. Eq., 782.

2. The act of 1898 providing for the assessment of corporations therein named by the local assessor for local purposes is not in conflict with either sections 51, 60 or 156 of the Constitution. Purnell v. Mann., 20 Ky. Law Rep., 1146.

HENRY L. STONE, JOHN F. LOCKETT, J. G. COVINGTON, G. W. JOLLY, W. S. BRONSTON, W. H. JULIAN AND F. J. HANLON, FOR APPELLEE.

Our contention is:

1. The board of valuation and assessment alone has power to value and assess the franchises of public service corporations for municipal taxation.

2. The acts of March 19, 1898 and March 23, 1900, were and are unconstitutional and void, being in violation of sections 51, 60 and 156 of the State Constitution.

AUTHORITIES CITED.

STATEMENT.

Sess. Acts 1898, pp. 96-102; Sess. Acts 1902, pp. 281-392; Sess. Acts 1900, pp. 89-90.

1. Sess. Acts 1891-2-3, pp. 277-366; *Ib.*, 981-1002; Sess. Acts 1900, pp. 65-67; *Lyddy v. Long Island City*, 104 N. Y., 218; *Co. Litt.*, 112; *Shep. Touchst.*, 88; *Sims v. Doughy*, 5 Ves., 243; *Constantine v. Constantine*, 6 Ves., 100; *Morral v. Sutton*, 1 Phila., 533; *Ely v. Thompson*, 3 A. K. Mar., 70; *Graham v. Luckett*, 6 B. Mon., 146; Endlich on the Interpretation of Statutes, sec. 200, p. 269; *People v. Lytle*, 1 Idaho, 161; *Commonwealth v. Kelliher*, 12 Allen (Mass.), 480, 481; *Herron v. Carson*, 26 W. Va., 62; *State v. Williamson*, 44 N. J. L., 165; Endlich, sec. 206, p. 275; *Payne v. Connor*, 3 Bibb, 180; *Korah v. Ottawa*, 32 Ill., 121; *Gwinner v. R. R. Co.*, 65 Pa. St., 126; *People v. Van Nort*, 64 Barb. (N. Y.), 205; Endlich, sec. 231, pp. 310-11; Endlich, sec. 241, pp. 320-21; *Long v. Stone*, 19 R., 246; *Combs v. Crawford*, *Ib.*, 1510; *Fultz v. Crofton*, *Ib.*, 1921; *Buchannon v. Commonwealth*, 95 Ky., 334; *Broadbuss v. Broadbuss*, 10 Bush, 306-8; *Adams v. Ashby*, 2 Bibb, 97; *Hickman v.*

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Littlepage, 2 Dana, 345; Dougherty v. Commonwealth, 14 B. Mon., 244.

2. Act of March 19, 1898; Act of March 23, 1900; Secs. 51, 60, 156 of the State Constitution.

OPINION OF THE COURT BY JUDGE PAYNTER—REVERSING.

The question involved is, shall the city assessor of Louisville, a city of the first class, assess the franchises of certain public service corporations for taxation for city purposes, or the board of valuation and assessment? The solution of this question depends upon whether the general revenue act of 1902, Sess. Acts 1902, pp. 281 to 392, inclusive) repeals the act of March 19, 1898 (Sess. Acts 1898, pp. 96 to 102, inclusive). The latter is an act concerning the assessment and valuation for taxes of corporate franchises and intangible property by cities of the first and second classes. This act expressly confers upon the city assessor the authority to assess the franchises and intangible property of the corporations in question but franchises of railroads are not included in this list. Previous to that time, under the general revenue law, which went into effect November 11, 1892, such franchises were assessed by the board of valuation and assessment, composed of the auditor, treasurer, and secretary of State. It is admitted that the act of 1898, if constitutional, repeals so much of the act of 1892 as authorized the board of valuation and assessment to assess these franchises, and that it was in force when the act of 1902 was passed. The act of 1902 is a general revenue act, the title of which is extraordinary, in that it purports to be an amendment to the revenue law approved November 11, 1892, as amended by twelve acts specifically enumerated in the title. Each of these amendments were general laws, and amendatory of the act of 1892. The title concludes, "that such act of

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November 11th, 1892, and as amended by the above stated subsequent acts and amendments thereto as now amended and re-enacted will read as follows." It would appear from the title of this act that the Legislature intended that there should be no mistake as to the purpose intended to be accomplished by the new enactment, and that there could be no question but what it was intended to be a substitute for the acts to which reference is made in the title. The act of March 19, 1898, applied only to cities of the first and second classes, and does not purport to be an amendment to the revenue act of 1892, or amendatory to any of the amendment thereto. If the Legislature had intended that the act of 1902 should also be substituted in lieu of the act of 1898, it seems extremely strange that, in its enumeration of the acts, it would have failed to refer to it as one of the acts proposed to be changed. In 1890 an act was passed authorizing the city assessors of cities of the third class to assess the franchises of certain corporations for taxation, and no reference is made to that act. Then there were two acts, which in a certain sense were general, but in application purely local, that were not mentioned or referred to in the act of 1902. These acts were only general in the sense that they referred to all cities of the classes mentioned therein, but they are local in the sense that they apply alone to certain cities.

In construing an act, the important thing is the ascertainment of the intention of the Legislature. To do this, we must consider the title of the act, its context, and the purpose of its enactment. It is well to bear in mind that the universal rule is that repeals by implication are not favored, and further, that when one act is local in its nature or application, or relates to particular places or persons, and the other a general one, they will both be up-

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held, and considered as forming one consistent whole. It is said in *Cope v. Cope*, 137 U. S., 686, 11 Sup. Ct., 223, 34 L. Ed., 832, that "nothing is better settled than that repeals (and the same may be said of annulments) by implication are not favored by the courts, and that no statute will be construed as repealing a prior one unless so clearly repugnant thereto as to admit of no other reasonable construction." The same rule was recognized in *McChord v. L. & N.*, 183 U. S., 483, 22 Sup. Ct., 165, 46 L. Ed., 289. If, under this rule, it could not be held that the act of 1898 was not repealed, it is certain that the rule for the interpretation of statutes with relation to the effect of a general upon a local law does control. The Legislature evidently did not have its attention directed to the subject of the act of 1898, and did not intend to derogate from that act when it made no special mention of its intention to do so. This court has universally recognized this rule of interpretation. In *Commonwealth v. Cain*, 14 Bush, 525, the court said: "It is a familiar rule of construction, both in England and America, that a statute can only be repealed by an express provision of a subsequent law or by necessary implication. There must be such a positive repugnancy between the provisions of the statutes that they can not stand together or be consistently reconciled. This rule applies when both statutes are of a general nature, but when one is local in its nature or application, or relates to particular places or persons, and the other is general, they will both be upheld and construed as forming one consistent whole." *Endlich on Interpretation of Statutes* recognizes the same rule, as section 223 reads as follows: "It is but a particular application of the general presumption against an intention to alter the law beyond the immediate scope of the statute to say that

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a general act is to be construed as not repealing a particular one; that is, one directed towards a special object or a special class of objects. A general later affirmative law does not abrogate any earlier special one by mere implication. '*Generalia specialibus non derogant.*' The law does not allow the exposition to revoke or alter, by construction of general words, any particular statute, where the words of the two acts, as compared with each other, are not so glaringly repugnant and irreconcilable as to indicate a legislative intent to repeal, but may have their proper operation without it. It is usually presumed to have only general cases in view, and not particular cases, which have been already otherwise provided for by the special act, or, what is the same thing, by a local custom. Having already given its attention to the particular subject, and provided for it, the Legislature is reasonably presumed not to intend to alter that special provision by a subsequent general enactment unless that intention is manifested in explicit language, or there be something which shows that the attention of the Legislature had been turned to the special act, and that the general one was intended to embrace the special cases within the previous one, or something in the nature of the general one making it unlikely that an exception was intended as regards the special act. The general statute is read as silently excluding from its operations the cases which have been provided for by the special one; for, as was said of the relation of a general act to a local one applying to a single county of the State, 'it is against reason to suppose that the Legislature, in framing a general system for the State, intended to repeal a special act which the local circumstances of one county had made necessary.' The fact that the general act contains a clause repealing acts inconsistent with

it does not diminish the force of this rule of construction." Independent of the unusual title of the act, under this rule of interpretation, we should hold the act of 1898 was not repealed; but the title to the act furnishes an additional reason for so holding, because it manifests an intention to only substitute the new for the previous acts to which reference is made in the title, and kindred acts of a general nature. The general repealing clause of the act can only apply to any purely general law affected by the act, not to laws of local application.

On behalf of the appellee much importance is attached to the fact that article 3, section 8, of the act of 1902, used substantially the same language as was contained in the act of 1892, which authorized the board of valuation and assessment to assess franchises in question for taxation; but this language is used because all the cities, other than the first, second, and third classes, were affected by the act, and the franchises therein were to be assessed by the board of valuation and assessment. The language used in the section and article referred to was to embrace the cities other than those of the first, second and third classes. It was not necessary to attempt to except these cities from the operation of the act, because that had been done by the previous acts. Besides, to have employed such language, making such exceptions, might have invited criticism to the effect that it was in conflict with section 60 of the Constitution, which provides that the "General Assembly shall not indirectly enact any special or local act by the repeal of any part of a general act or by exempting from the operation of the general act, any city, town, district or county, but laws repealing local or special acts may be enacted." It must be understood that the court is not expressing an opinion on that question, as it is not here.

By the act of 1902 the Legislature was dealing with the act of 1892 as it found it—with the cities of the first, second, and third classes excluded from its provisions with reference to the assessment of certain franchises. It is therefore possible to uphold the act of 1898 and the act of 1892 as amended by the act of 1902, and to construe them as forming one consistent whole.

It is insisted upon behalf of the appellee that the act of 1898 is violative of sections 51 and 156 of the Constitution. Section 51 of the Constitution reads as follows: "No law enacted by the General Assembly shall relate to more than one subject, and that shall be expressed in the title, and no law shall be revised, amended, or the provisions thereof extended or conferred by reference to its title only, but so much thereof as is revised, amended, extended or conferred, shall be re-enacted and published at length." The title to the act of 1898 concerns the assessment and valuation for taxation of corporate franchises and intangible property by cities of the first and second classes. There is but one subject to the title, and that is the assessment and valuation for taxation of corporate franchises and intangible property. The mere fact that it applies to cities of different classes can not make the act relate to more than one subject. Section 156 of the Constitution requires cities and towns to be classified, and the same law applies to all cities of a given class. This does not mean that a general law could not be made applicable to all the cities and towns of the Commonwealth.

The proposition is urged that the act of 1898 is invalid because it is an attempt to revise or amend the general law in regard to revenue. This proposition is answered in *Purnell v. Mann*, 105 Ky., 87 (20 R., 1146) 48 S. W., 407. In

that case the court said: "There is no direct reference made in the act in question to any particular section of the general election law amended or repealed by it, nor do we think section 51 expressly or impliedly requires it done. The act, as passed and published, is full and specific enough, as to all subjects embraced by it, to show for what parts of the general election law it is substituted, and those parts are, both in terms and by implication repealed, leaving the residue unaffected and in full force. Manifestly, neither members of the General Assembly nor the people could misunderstand, or be deceived as to the purview, purport or effect of the act." Section 60 of the Constitution was not violated by the act of 1898. The act of 1898, not indirectly, but directly, repealed part of the act of 1892. That section does not mean that a general law can not be passed in reference alone to cities of two classes. If a general law applies to cities of all classes, it necessarily must apply to the cities of the same class. Such a law would not be violative of the provisions of the Constitution. As illustrative of this, counsel for appellant suggest section 1486 of the Kentucky Statutes, which provides that "in all cities and towns of the first, second, third and fourth classes there shall be registration of all the qualified voters of the respective cities and towns, which registration shall be held and conducted as herein provided." This section is certainly constitutional. We are of the opinion that the act of 1898 is constitutional, and that the act of 1902 did not repeal it.

Judgment is reversed for proceedings consistent with this opinion.

Judge Hobson's dissenting opinion:

The act of November 11, 1892, provided a system for the taxation of the franchises of public service corporations

by the State, and the several counties, cities, towns and taxing districts. It vested the power of assessing these franchises in the board of valuation and assessment. Their assessment was the basis of taxation by the State, and by all the counties, cities, towns and taxing districts where the franchises were exercised. Sess. Acts, 1891-93, pp. 981-1002. On March 19, 1898, an act entitled "An act concerning the assessment and valuation for taxation of corporate franchises and intangible property by cities of the first and second class" was passed, providing for the assessment of these franchises by the city assessor for the purpose of city taxation. See Sess. Acts 1898, pp. 96-102. On March 29, 1902, the Legislature enacted a general revenue act (Sess Acts 1902, pp. 281-392). The question in this case is whether the last act repealed the act of March 19, 1898, by which the city assessor was authorized to assess for taxation in cities of the first and second classes the franchises of these corporations. Article 3, subd. 1, of the act, provides for the taxation of the franchises of these corporations. Pages 305-313. In section 1 the corporations to be assessed are specified. The auditor, treasurer and secretary of State are constituted a board of valuation and assessment for fixing the value of the franchises; and, where more than one jurisdiction is entitled to a share of the taxes, the board is authorized to determine how the tax shall be apportioned. By section 2, reports are to be made to the auditor of a number of facts necessary to an intelligent assessment of the franchises. By sections 3, 4, and 5, rules as to the apportionment of taxes are given "in each county, incorporated city, town or taxing district." And in section 5 these words are used: "Such corporate franchise shall be liable to taxation in each county, incorporated city, town or district through

or into which such lines pass or are operated in the same proportion that the length of the line in such county, city, town or district bears to the whole length of lines in this State." Section 6 provides for a like system of taxation of any association not incorporated, engaged in the business mentioned in the first article. Section 7 provides for a hearing before the board by any of the companies as to the valuation. Section 8 then follows, in these words: "The auditor shall, at the expiration of thirty days after the final determination of such values, certify to the county clerk of the counties, when any portion of the corporate franchise of any such corporation, company or association shall be liable to local taxation as herein provided, the amount thereof liable for county, city, town or district tax; and such certificate shall be by each county clerk filed in his office, and be by him certified to the proper collecting officer of the county, city, town or taxing district for collection, and all county, city, municipal, school and other taxes shall be due and payable thirty days after the notice of the amount of such tax is given by the officer whose duty it is to collect the same." Sections 9, 10, 11, 12, 13 and 14 make provisions in regard to the reports required of these corporations designed to secure the making of the reports. Section 15, after setting out that "all county, municipal school and other taxes shall be due and payable thirty days after notice of the amount of the tax is given," adds: "Every such corporation, company or association failing to pay its taxes after receiving thirty days notice shall be deemed delinquent, and a penalty of ten per cent. on the amount of the tax shall attach, and thereafter such tax shall bear interest at the rate of ten per cent. per annum; any such corporation or association failing to pay its taxes, penalty and interest after becoming

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delinquent shall be deemed guilty of a misdemeanor and on conviction shall be fined fifty dollars for each day the same remains unpaid, to be recovered by indictment or civil action of which the Franklin circuit court shall have jurisdiction." Page 311. The last section of that act is in these words: "All acts and parts of acts in conflict with this act are to the extent of such conflict repealed."

It will be observed that the act creates a board to make the assessment of the franchises of these companies, and authorizes that board to apportion the taxes between the several counties, cities, towns, and taxing districts entitled thereto; expressly providing that all county, city, municipal, school and other taxes shall be due and payable thirty days after the certificate of this board is filed in the clerk's office in the county, and notice of the amount of the tax is given by the officer whose duty it is to collect it. It will also be observed that the act provides a ten per cent. penalty, as well as the payment of interest at 10 per cent., upon all county, municipal, school and other taxes which are not paid when due, as above provided. And then, finally, it is provided that all acts or parts of acts in conflict therewith are, to the extent of such conflict, repealed. The act of 1898 authorizing the assessment of the franchise of these corporations in cities of the first and second classes by the city assessor for municipal taxation is clearly inconsistent with these provisions, for they require the assessment to be made by the board created thereby, not only for State purposes, but for "taxation in each county, incorporated city, town or district through or into which such lines pass or are operated in the same proportion that the length of the line in such county, city, town or district bears to the whole length of lines in this State." They necessarily regulate the entire subject of

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the assessment of the franchises of these corporations for State and municipal purposes, for nothing is excepted out of their operation, and, on the contrary, all acts or parts of acts in conflict with them are expressly repealed. Can it be believed that section 15, regulating the penalty and the interest to be paid on these taxes if delinquent, was not intended by the Legislature to apply to all cities of the Commonwealth? And if section 15 applies to cities of the first and second classes, why does not section 1 or section 8? That the Legislature intended the act as a general revenue law is apparent from other provisions in it. The next subdivision of article 3 provides for the assessment of the stock of national banks, and manifestly applies to the "State, county, city, town and district." The next subdivision regulates building and loan associations; the next, turnpikes. Article 4 regulates railroads, and is applicable by its express terms, not only to State taxes, but to "all county, city, municipal, school and other taxes." Article 5 regulates the distillery bonded warehouses, and, by its terms, covers the taxes due the county, city, town or taxing district as well as the State. When it is conceded that as to railroads, distilleries and the like the act applies to all cities, how can it be maintained that it does not, as to franchises of the public service corporations, where precisely the same words are used, and, by the express terms of the act, all laws in conflict with it are, to the extent of such conflict, repealed? "It is not in accordance with the settled rules of construction to ascribe to the law-making power an intention to establish conflicting and hostile systems upon the same subject, or to leave in force provisions of law by which the later will of the Legislature may be thwarted or overthrown. Such a result would render legislation a useless

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and idle ceremony, and subject the law to the reproach of uncertainty and unintelligibility." *Lyddy v Long Island City*, 104 N. Y., 218, 10 N. E., 155. In *Payne v. Connor* 6 Ky., 180, this court had before it the effect of a repealing clause which was in these words: "All acts or parts of acts coming within the purview hereof shall be and the same are hereby repealed." Speaking of the meaning of the word "purview," the court said: "The meaning usually attached to this term by writers on law seems to be the enacting part of a statute in contradistinction to the preamble, and we think the provision of the act repealing all acts or parts of acts coming within its purview should be understood as repealing all acts in relation to all cases which are provided for by the repealing act." In the case before us the words of the repealing clause are broader. All acts in conflict with the last act are, to the extent of such conflict, repealed; and the case we have before us is, in express terms, provided for by the repealing act. The statute before us, being a general revenue law, must be held to repeal all other statutes inconsistent with it then in force. In the *Encyclopaedia of Law*, vol. 23, p. 477, the rule is thus stated: "Where an act is passed covering the whole of a particular subject or field of legislation, it is customary to insert a general clause repealing all acts or parts of acts inconsistent therewith. Such a clause is effective in repealing inconsistent enactments." In *Patterson v. Caldwell*, 4 Metc., 489, this rule was enforced by this court, where it was held that section 875 of the Code of Practice, repealing all laws inconsistent with its provisions, or applicable in any case provided for by the Code, abrogated certain provisions of the Revised Statutes as to taking out an attachment. This was followed in *Grigsby v. Barr*, 77 Ky., 330. The authorities elsewhere

are uniform to the same effect. *U. S. v. Cheeseman*, 3 Sawy., 424, Fed. Cas., No. 14,790; *McRoberts v. Washburne*, 10 Minn., 23 (Gil. 8); *Ogden v. Witherspoon*, 3 N. C., 227, Fed. Cas. No. 10,461; *Prince George County v. Laurel*, 51 Md., 464.

Two grounds are relied on to distinguish this case from those cited:

(1) The title of the act is very unusual. It is entitled "An act to amend the act of November 11, 1892," as amended by twelve subsequent acts, each entitled, "An act to amend" the act referred to; and, after setting out all these in the title, it concludes with these words: "So that said act of November 11, 1892, and as amended by the above stated subsequent acts and amendments thereto, as now amended and re-enacted, will read as follows." The title of an act may properly be looked to in construing the language of the act. But where there is no ambiguity in the terms used, the title can not be allowed to override the express provisions of the act itself. Everything in the act in question is germane to the subject expressed in the title. The fact that the act of 1898 was not referred to in the title is wholly immaterial. The only unusual thing is that so many amendments of the act of 1892 were set out in the title. If all the acts intended to be affected had been set out in the title, then it would have been entirely superfluous to have added the section repealing all laws in conflict with the act, for, if there was nothing for this section to operate on, why was it inserted? There were many learned lawyers in the General Assembly, who were acquainted with the previous legislation; and if all acts, so far as they were in conflict with this act, were not intended to be repealed by it, are we to assume that the Legislature meant nothing by the repealing clause?

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All acts similar to the act of 1898 which had been passed since November 11, 1892, were not set out in the title. See act entitled "An act to regulate the assessment and sale of lands for taxation owned by non-residents of this Commonwealth" (Acts 1894, p. 199); also, "An act extending the same (Acts 1894, p. 212); also, an act entitled "An act regulating the mode of assessing building associations" (Acts 1894, p. 342). Are all these acts, so far as they are inconsistent with the act of 1902, still in force? If not, how is the act of 1898 to be distinguished from the other inconsistent acts which are repealed, to the extent they are inconsistent? Besides all this, the legislative purpose seems plain enough. There had been a number of amendments to the act of 1892, so that the real law on the subject had to be spelled out from a number of inconsistent enactments. The Legislature desired to make further changes, and, to show that the act is now passed superseded not only the original act, but all the amendments to it, placed in the title of the act all the acts intended to be blotted out, so that it would be understood that the law of the State was not to be spelled out in part from these acts, and in part from the act which they passed. The act of 1898 was not one of those thus consolidated in the new act, and therefore was not mentioned in the title. But it was one of the acts coming within the purview of the repealing clause, because inconsistent with the provisions of the act.

(2) The rule is invoked that a general law does not repeal a special law on the same subject, and that both will be read together where this is practicable. The rule is admitted, but it is not perceived that it has any application to the case before us. It rests upon the presumption that the Legislature, in making the law for the entire State,

did not have in mind the question of changing a special act applicable to a single town or county. But the act in question is not of this character. It applies to all cities of the State of the first and second classes. All cities having a population of 20,000 or more must belong to one of these classes. So that the act applied to all cities in the State having a population of as much as 20,000. Const., section 156. By amendment it was made applicable to cities of third class having a population of 8,000. The court knows judicially that this embraces all the more important cities in the State, and that in these cities the public service corporations are mainly located. Banks, trust companies, guaranty companies, gas companies, water companies, street railway companies, electric light companies, and the like, in the main, have their headquarters at the centers of capital; and to exempt all of them, in cities of the first, second and third classes, from the operation of the bill, would have been to exempt most of this capital from municipal taxation in the manner provided by the statute. It is incredible that the Legislature could have overlooked such an exception, if it had intended to make it, for the reason that, as to municipal taxes, the exception would have been larger than what was left in the act. To apply the rule referred to in such a case would be to ignore the reason for the rule, and to refuse proper effect to the express terms of the statute, repealing all other acts inconsistent therewith.

The general rule is that a statute revising the entire subject-matter of a previous act repeals it by implication *Bartlet v. King*, 7 Am. Dec., 99; *State v. Wilson*, 82 Am. Dec., 163; *Rogers v. Waltrous*, 58 Am. Dec., 100; 7 *Laws on Rights and Remedies*, section 3779. The argument for appellant, which is adopted by the court, treats the

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case as dependent on the question whether that rule should be applied here. But that is not the case we have. Here the statute does not leave to implication what was meant, but, in express terms, declares that all inconsistent acts are, so far as they conflict with this act, repealed. In *Endlich on Interpretation of Statutes*, after stating the rule as to implied repeals, in section 266, it is said: "Yet where a statute contemplates, in express terms, that its enactments will repeal earlier acts by their inconsistency with them, the chief argument or objection against repeal by implication is removed, and the earlier acts may be more readily treated as repealed. . . . Thus a declaration in a general law that all acts or parts of acts, whether local or special, or otherwise inconsistent with its provisions, are to be deemed repealed, will repeal inconsistent provisions, even in special acts" If there had been no repealing clause in the act in question, it would have been a matter of construction for the court, on the whole act, how far the provisions of the statute were intended to supersede other acts not named in the title, covering the same subject-matter. But when the Legislature went further, and repealed all inconsistent acts, there is no room for the doctrine of implied repeal, and the only question is whether the former act is consistent with the latter. The acts set out in the title are, by its express terms, reduced to one, and embraced in the act in question. The repealing clause can not have reference to these acts, for by the terms of the act the new act is substituted for them; and if the repealing clause does not apply to other acts than those named in the title, it was merely surplusage. No rule is better settled than that the court must presume that the Legislature meant something by a section of the bill, else it would not have been added to it. If in the

title the bill had been designated merely as an act to amend the act of November 11, 1892, would there be any doubt that the section repealing all other acts inconsistent with it would have embraced the act of 1898? But if the title had so read, other amendments to the act of 1892, so far as they were not inconsistent with this act, would have been left in force. To avoid this, and incorporate in one act these various amendments, the title of these acts was inserted in the caption; and for each other inconsistent acts, so far as they were in conflict with the act in question, the last section was added, repealing them so far as they conflicted with this act. If the repealing clause of this act had provided that all acts, special or general, in conflict therewith, were, to the extent of said conflict, repealed, then, under all the authorities, this would have included the act of 1898. But the Legislature of this State is by the Constitution forbidden to enact special or local laws. The subjects embraced in the act of 1902 must, under the Constitution, be regulated by general laws. The authorities from other States, where general legislation is prohibited, to the effect that a general repealing clause does not include special acts, has no place in this State. It would never occur to any one to insert now, in a bill covering a subject which must be regulated by general laws, words repealing special acts inconsistent therewith, and it can not be expected the Legislature should do a vain thing. To say that the act of 1902 could have contemplated that it was only to apply to the cities and towns of the State other than those of the first, second, and third classes, as to municipal taxation of franchises, is to presume that the Legislature, when it used general words including all the cities, intended to exempt from this mode of municipal taxation at least three-fourths of this class

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of capital in the State. If the statement of the proposition is not sufficient answer to it, then it is submitted that the presumption no longer exists that the Legislature acts intelligently, and uses words in its enactments advisedly.

I therefore dissent from the opinion of the court.

Judge Nunn concurs in this dissent.

Petition for rehearing by appellee overruled.

CASE 89—ACTION BY KENTUCKY CHAUTAUQUA ASSEMBLY AGAINST CITY OF LEXINGTON, ETC., TO ENFORCE CONTRACT WITH THE CITY FOR THE SALE OF WOODLAND PARK.—FEB. 10.

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Assembly.

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123 291

114 781
1127 466

APPEAL FROM FAYETTE CIRCUIT COURT.

JUDGMENT OVERRULING GENERAL DEMURREE TO PLAINTIFF'S PETITION AND DEFENDANTS APPEAL. AFFIRMED.

MUNICIPAL CORPORATIONS—POWER TO ACQUIRE PARK FOR CITY PURPOSE.

Held: 1. Kentucky Statutes, section 3038, gives cities of the second class power to acquire property for municipal purposes, and section 3058, subsection 16, confers power to purchase or lease any real or personal property for the use of the city. HELD, that the acquisition of land for a public park was for a municipal purpose, and authorized.

W. S. BRONSTON, FOR APPELLANTS.

MORTON, DARNELL & WILSON AND J. H. BEAUCHAMP, FOR APPELLEE.

This is a friendly suit to test the validity of an ordinance of the city of Lexington authorizing the submission to a popular vote the proposition to purchase the grounds of the Kentucky Chautauqua Assembly lying partly within and partly

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without the city, consisting of about twenty acres, to be used by the city for a public park. The vote having carried, the mayor was called on to issue the bonds of the city for the agreed price, \$38,000, and to accept the deed tendered by the plaintiff, and having some doubts as to the validity of the purchase, he declined to issue said bonds or to accept the deed, hence this suit to enforce the contract.

A petition was filed by the Kentucky Chautauqua Assembly setting out the facts above recited to which the city and mayor filed a general demurrer, which, being overruled by the court, the city declined to plead further and from the judgment entered enforcing said contract the city appeals to test the validity of said purchase.

We submit:

1. That the city has the power to contract for and purchase the property in question for a public park and pleasure grounds for the city.
2. That the power in this case has been lawfully exercised.

AUTHORITIES CITED.

Holder v. City of Yonkers, 56 N. Y. S., 912 (S. C., 39, App. Dev., 1); Richmond, &c. v. Town of West Point, 94 Va., 668 (S. C., 27, S. E., 460); Modern Law Mun. Corp., sec. 623; A. & E., vol. 20, p. 1184, Kentucky Statutes, secs. 2840, 2859, 3070, 3073, 3190, 3195, 3637, subsec. 1; Louisville v. Dupont, &c., 23 R., 106; *In re Mayor*, 99 N. Y., 569 (S. C., 2 N. E. Rep., 642); St. Louis v. Griswold, &c., 58 Mo., 175, 15 Wend., N. Y., 374; Belknap v. City Louisville, &c., 99 Ky., 474; Montgomery Fiscal Court v. Trimble, 20 Rep., 827.

OPINION OF THE COURT BY JUDGE BURNAM—AFFIRMING.

The appellant, the city of Lexington, has appealed in this case from a judgment of the Fayette circuit court overruling a general demurrer to the petition of appellee in a suit brought to require the defendant H. T. Duncan, as mayor, to carry out a contract made with the city council of Lexington for the purchase of Woodland Park. The facts alleged in the petition and conceded by the demurrer to be true are that the Kentucky Chautauqua Assembly, a corporation, through its president, proposed in writing to H. T. Duncan, mayor of the city, on the — day of September,

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1902, to sell to the city the grounds of the company known as "Woodland Park," for the purpose of a public park, for the sum of \$38,000, which was to be paid within a reasonable time after the city of Lexington should be authorized to make the purchase under the provisions of the charter of the city, but not later than February 1, 1903; that this proposition was duly submitted by the mayor to the council of the city, who, on the 11th of September, by an ordinance, authorized the mayor to submit to the voters of the city of Lexington, at an election to be held for that purpose, the question of accepting the proposition and issuing bonds sufficient to pay therefor the sum of \$38,000; that pursuant to the ordinance an election was duly held, after giving the notice required by the statute, on the 4th of November, 1902, the same being the day on which the regular annual election was held; and that at this election 1,601 voters voted in favor of the purchase and 638 against it. More than two-thirds of the entire number of votes so cast were in favor of the proposition, which vote was duly ascertained by the board of election commissioners of Fayette county on or about the 10th day of November, 1902, and so certified to the general council of the city of Lexington, and to H. T. Duncan, mayor of the city; that the general council thereupon authorized the city solicitor of the city to institute legal proceedings to test the validity of the bonds authorized by the vote before placing them upon the market; and plaintiff, in conformity with their proposition to sell, executed and tendered to the city, through its mayor, a sufficient deed to the land, and demanded the payment of the contract price. It is further alleged that the assessed value of the taxable property of the city, previous to incurring the indebtedness, was \$17,635,916.32; that the rate of taxation fixed by the city for

the fiscal year in which the indebtedness was incurred was \$1.16 2-3 per hundred. All steps looking to the consummation of the agreement by the city to purchase the property seem to be in strict conformity with the constitutional and statutory provisions applying thereto. The whole question, at last, is one of power in the council to make the purchase; for, if they had the power, it will not be contended that their discretion, judgment, or prudence in making it, if honestly exercised, can be controlled or revised by the courts.

Section 3038 of the Kentucky Statutes reads as follows: "The cities of Covington, Newport and Lexington are hereby declared to be cities of the second class, and the inhabitants thereof, and such other cities as may hereafter be declared cities of the second class, respectively, are created and continued bodies corporate and politic, within their respective limits, with perpetual power to govern themselves in all fiscal, prudential and municipal concerns, by such ordinances and resolutions as they may deem proper, not in conflict with this act or the Constitution of the State of Kentucky, or the Constitution of the United States; to acquire property for municipal purposes, by purchase or otherwise, within their corporate limits or elsewhere; to hold the same and all property and effects now belonging to said cities, held either in their own name or in the name of other, for the use of each of said cities, for the purpose and interest for which the same were granted or dedicated; to use, manage, improve, sell, convey, rent or lease the same; and to have like power over property hereafter acquired, and as such, by their respective names, shall be capable in law of contracting and being contracted with, of suing and being sued, of pleading and being pleaded, answering and being answered, in all courts and places,

and in all matters whatsoever; and shall have and use, respectively, a corporate seal, and make, change, alter and renew the same at pleasure." And by subsection 16 of section 3058 they are given power "to purchase or lease within the limits of the city, or elsewhere, any real or personal property for the use of the city, to control, manage, improve, sell or lease, or otherwise dispose of the same for such purpose and consideration as it may deem proper for the public welfare." So far as we are able to find in the charter, this authority to purchase land for the public welfare is subject to no restriction or limitation, except that a limitation is placed upon the amount of indebtedness which the city may incur, and the amount which shall burden the city in any one year. These limitations in no wise affect any question involved in this appeal. The authority to buy is granted in express terms, the obligation incurred is within the limitation, and the only question which remains is, was the authority exercised for a city purpose? It seems to us that there can be no doubt that the acquirement of lands for the purpose of a public park is a city purpose. The health and comfort of the inhabitants of a city is necessarily one of the chief concerns of municipal government. No one at this late date would for a moment question the power of a city to furnish pure water, light, clean streets, and proper sewerage. And the obligation to furnish pure air and a place for healthful exercise and recreation stands upon the same footing, and is a city purpose. In *re Mayor, etc., to Acquire Parks*, 99 N. Y., 569, 2 N. E., 642, the words "city purpose" are defined, and held to include the purchase of lands adjoining a city, but beyond its boundaries for a park. The court said: "It is impossible to formulate a proper definition of

what is meant by a 'city purpose.' Yet two characteristics it must have. The purpose must be primarily the benefit, use and convenience of the city, as distinguished from that of the public outside of it, although they may be incidentally benefited; and the work be of such a character as to show plainly the predominance of that purpose. And then the thing to be done must be within the original range of municipal action. Acquiring and maintaining parks is within that range." In *People v. Kelly*, 76 N. Y., 487, the court says: "The acquirement of land for purposes of a city park is a city purpose." An analogous question was before the court in the *City of Owensboro v. The Commonwealth*, 105 Ky., 344 (20 R., 1281) (49 S. W., 320, 44 L. R. A., 202). The question in that case was as to the power of the Commonwealth to compel the city to pay taxes on a public park belonging to the city. It was held exempt from taxation as public property used for public purposes. The court said: "The municipal authorities are charged with the duty to maintain the public health, and in the judgment of scientific men it is essential to the public health that cities have and maintain parks where the people can have pure, wholesome air. They are just as much public property, used for public purposes, as are the streets and trees planted therein, and it would be just as proper and reasonable to tax the one as the other. In our opinion, the public park is public property used for a public purpose, and necessary to the proper government of a city." Dense populations require these breathing places. We are, therefore, of the opinion that the acquirement of Woodland Park by the city authorities of Lexington is a city purpose, and within the provisions of the charter. It therefore follows that the demurrer was properly overruled, and the Defendant Duncan, as mayor of the city,

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required to carry out the provisions of the ordinance, and sell in pursuance thereof the bonds provided for, and out of the proceeds of such sale to pay to the appellee, the Kentucky Chautauqua Assembly, the sum of \$38,000, as agreed to be paid for the park property.

Judgment affirmed.

CASE 90—THE LOUISVILLE & NASHVILLE R. R. CO. WAS INDICTED AND CONVICTED OF UNLAWFUL DISCRIMINATION IN FREIGHT CHARGES UNDER THE "LONG AND SHORT HAUL" STATUTE.—FEB. 11.

Louisville & N. R. R. Co. v. Commonwealth.

APPEAL FROM MARION CIRCUIT COURT.

DEFENDANT CONVICTED AND APPEALS. REVERSED.

CARRIERS—UNLAWFUL DISCRIMINATION—INDICTMENT—RAILROAD COMMISSION—FAILURE TO EXONERATE IN SPECIAL CASE—EFFECT ON FUTURE SHIPMENTS.

Held: 1. Const. section 218, makes it unlawful for a common carrier to charge more in the aggregate for the transportation of passengers or property of like kind, "under substantially similar circumstances and conditions," for a shorter than a longer distance over the same line, in the same direction, etc., provided that, on application to the railroad commission, the carrier may, on investigation, be authorized to do otherwise, and the commission may from time to time prescribe the extent to which the section may be relieved against. Kentucky Statutes, section 820, provides the punishment for such unlawful discrimination, and the procedure therefor, and enacts that, on complaint to the commission, it shall investigate the grounds thereof, and make an order either exonerating or failing to exonerate the carrier, and shall furnish a copy of the latter, with a statement of facts, to any grand jury having jurisdiction, in order that the carrier may be indicted for the offense, and shall use proper efforts to secure indictment and prosecution. HELD, that an order failing to exonerate a carrier,

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and recommending its indictment in specially named cases, could not be made the basis of an indictment for unlawful discrimination in subsequent shipments.

W. C. MOCHORD, FOR APPELLANT.

POINTS AND CITATION.

1. An indictment can not be properly found against a carrier, for violating the Constitution and statutes prohibiting a carrier charging more for a short than a long haul, until after the circumstances and conditions incident to such transportation have been investigated by the railroad commission, and a recommendation to the grand jury that indictments be returned for offenses, which the commission refuses to exonerate. Constitution, sec. 218; Kentucky Statutes, sec. 820; L. & N. R. R. Co. v. Commonwealth, 20 Ky. Law Rep., 1386; L. & N. R. R. Co. v. Commonwealth, 21 Ky. Law Rep., 235; I. C. R. R. Co. v. Commonwealth, 23 Ky. Law Rep., 1159.

2. The railroad commission has control of all prosecutions by indictment for violating the long and short haul provisions of the Constitution and statutes, and may exonerate the carrier from the offense by a reconsideration of the circumstances and conditions under which the transportation was made, and if, after an indictment has been returned, the commission finds the circumstances and conditions of the long and short haul dissimilar and exonerates the carrier from the offense charged in the indictment the prosecution must fail. L. & N. R. R. Co., 21 Ky. Law Rep., 235.

3. Before there can be a conviction under an indictment charging that defendant had violated the long and short haul law the Commonwealth must prove that the short haul was over the same line of railroad and that the short haul was included in the long haul. L. & N. R. R. Co. v. Walker, 23 Ky. Law Rep., 433.

4. Before there can be a conviction under the statute, the proof must show that the carrier charged and received less for transportation to the longer points named in the indictment as the longer distance than was charged and received for shipment to the point named in the indictment as the shorter distance.

5. A witness by whom it is attempted to prove what a railroad rate tariff sheet showed, should not be allowed to tell what the tariff was, but the rate sheet, itself, is the best evidence of what it shows and should be read to, or by the jury and filed as part of the record; unless the paper is lost or can not be produced.

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A paper purporting to be a certified copy of a lost record can not be read as evidence until after it has been supplied, as *required* by the *statutes*. Kentucky Statutes, secs. 1643, 3994 and 3995.

EDWARD W. HINES AND THOMAS B. HARRISON, JR., FOR APPELLANT.

1. The Commonwealth must prove the offense as alleged. *Clark v. Com.*, 16 B. M., 211; *Com v. Megowan*, 1 Met., 368.
2. Evidences of other offenses is not admissible. *Martin v. Com.*, 93 Ky., 189.
3. A recommendation of the commission to indict for all future offenses would not suffice, but even if that would be sufficient it is clear that there was no such recommendation in this case.

OPINION OF THE COURT BY JUDGE BARKER—REVERSING.

The appellant was indicted by the grand jury of the Marion circuit court, at its January term, 1899, for a violation of section 820 of the Kentucky Statutes, commonly known as the "Long and Short Haul Statute." It will not be necessary in this case to examine the indictment, further than to say that its allegations are sufficient, and that it contains, among other things, a statement that it was found upon the recommendation of the railroad commission. The case came on for trial in the Marion circuit court in 1902, and the only evidence introduced by the Commonwealth in support of the allegation that the indictment was found upon the recommendation of the railroad commission was a report of the commission to the Marion circuit court and grand jury, made in 1895, charging the appellant with violations of section 820 of the Kentucky Statutes, and recommending its indictment in some fifteen specially named cases, none of which was the case at bar. The appellant, at the close of the Commonwealth's testimony, moved the court for a peremptory instruction to the jury to find it not guilty. This motion

was overruled. The court then gave written instructions to the jury, and, the case having been submitted, a verdict of guilty was returned, and a penalty of \$300 imposed upon appellant. The motion for a new trial having been overruled, the case is here on appeal.

The conclusion which we have reached regarding the law of this case makes it unnecessary to examine or discuss any other questions than such as are involved in the proposition as to whether or not the court erred in overruling appellant's motion for a peremptory instruction.

In order to obtain the meaning and intent of section 820 of the Kentucky Statutes, it is necessary to take a brief survey of the history of this enactment.

There had been much complaint, of long standing, throughout the Commonwealth, that the railroads were habitually engaged in the business of discriminating between localities in the matter of freight rates; that cities and communities were being pushed forward in the march of material progress by friendly discrimination on the part of the railroads, at the expense of other cities and communities, which were being retarded and repressed by unfriendly discriminating rates. Whether or not this was true, is immaterial. It was believed to be true, and this belief on the part of the people of the State was crystallized in section 218 of the Constitution, and in the subsequent enactment of section 820, providing a remedial procedure to carry into effect the provisions of the Constitution on this subject. But while there was ardent desire on the part of the people and their representatives to repress the offense of unjust discrimination by railroad corporations, there was also a wholesome fear of unjustly and wantonly injuring these great and necessary agencies of the material prosperity of the Commonwealth by hasty and ill-in-

formed zeal in the matter of applying the remedy to the supposed wrong. It was recognized that the subject of transportation in railroad business involves one of the most profound and abstruse problems with which railroad managers have to deal. It was seen that, with this problem, the average jurymen, whether grand or petit, would be helpless and impotent; that he would neither have the trained power nor the necessary data to enable him to understand the difficult subject involved in the expression "substantially similar circumstances and conditions;" and that a jury organized in a community smarting under the exasperation of a supposed invidious discrimination of rates against it would be unable to take any but a narrow and sectional view of the acts from the effects of which they were suffering. Therefore it was deemed wise to take the whole subject out of the danger of sectional bias, and place it in the hands of a commission representing not one community, but the whole State—a commission which should be elected, in the aggregate, by all of the people of the Commonwealth, and which for this reason would represent the interest of the whole State, and not the interest of any single city or locality; a commission which would take into consideration the needs of the manufacturer, the miner, the lumberman and the railroads, as well as the interest of the people at large, and which would lift the subject out of the realm of sectionalism, and place it in the realm of commercial statesmanship. In order that the commission should do this, they were to be elected for a term of years, that they might have ample time to study all of the questions involved in their duty. They were given a salary adequate to warrant the devotion of their whole time to the questions of railroad management, and it was made the duty of every railroad corporation in the

State to make an annual report to them, embracing every fact concerning the affairs of the corporation which were presumed by the framers of the law to be necessary to a proper understanding of the whole problem of regulating the railroad corporations of the Commonwealth; and, for fear that the statutory report required had overlooked some data necessary or useful to this end, it was provided that the corporations should answer any other questions propounded to them by the commissioners. The commissioners were invested with the power to summon any person or persons they pleased, and to examine them under oath touching any subject connected with the affairs of the operation of a railroad in the State. It is impossible to read the whole law, the substance of which is here sketched, without being impressed with the fact that the commissioners were to be prepared to grapple with problems which no grand or petit jury of the Commonwealth could successfully compass, and that the duty of making the investigation which involved the exercise of all this knowledge, so laboriously acquired, lies at the very root of, and is precedent to, an indictment by a grand jury for an offense which could only be properly investigated by an intelligent and well-informed commission. It would, indeed, be a vain and useless thing to establish a railroad commission, to be elected by the people of the whole State; and put into their hands all the data concerning railroads which the owners and managers thereof possessed, if the problems to be solved were such as an average jury would be competent to grasp and understand. If there was nothing in the problem but the respective distances of the localities, and the respective rates charged thereto, the proposition would, instead of being profound and abstruse, be reduced to the

simplicity of the equation that two plus two equals four. But there was recognized to be far more in the problem than the distances of the two localities from the point of shipment, and the respective rates imposed. The question of competition was to be considered, and was recognized as being involved in the problem of "substantially similar circumstances and conditions;" and this being a subject with which the commission could, and the jury could not, deal, it was required, as a condition precedent to an indictment in any particular case, that the commission should first decide whether or not the circumstances and conditions were substantially similar. If, after examination, this question was decided adversely to the railroad, then the remaining facts necessary to be established to constitute its guilt were peculiarly within the province of the jury. If this question was decided in favor of the railroad, then there was nothing for the jury to do in the premises.

In the case of the Illinois Central Railroad Company v. The Commonwealth, 23 R., 1159, 64 S. W., 975, it was held by this court that an investigation by the railroad commission was a condition precedent to an indictment by a grand jury for a violation of the provisions of section 820 of the Kentucky Statutes. In the case cited the court said: "In the construction of statutes, the cardinal aim of the court is to arrive at the intention of the Legislature. The court will presume that the Legislature meant something by all the provisions of the statute, and will endeavor to give them all a fair effect. If the Legislature had intended indictments to be found for each offense, regardless of action by the railroad commission, we see no reason why the section might not have stopped with the first sentence, defining the offense and providing for its punishment; for by the

next section (Kentucky Statutes, section 821) it is made the duty of the commission 'to see that the laws relating to all railroads, except street, are faithfully executed,' and under this provision it would be the duty of the commission to see to violations of the preceding section. Not only so, but it provided in section 820 that, if the commission deems it proper to exonerate a carrier from the operation of its provisions, an order to that effect shall be made, and after such order the carrier shall not be prosecuted for that matter. To indict the carrier in the first place without action by the railroad commission would be to deprive it of all benefit of this provision. If the commission had only power to pass on the same facts as the grand jury, it might, perhaps, be maintained that the Legislature intended to provide a cumulative remedy, and that a preliminary hearing before the commission was not essential. But such is not the fact." The court, then, after discussing various decisions of this court on kindred propositions, goes on to say: "It will be observed that the constitutional convention did not adopt a hard and fast rule, making the charge of more for the short than for the long haul unlawful, but expressly empowered the commission to authorize the railroad to charge less for longer than for shorter distances, and to prescribe from time to time the extent to which the carrier might be relieved from the operation of the section. There were many industries in the State whose interest required this. More than one coal famine had occurred. The only security against a recurrence of this trouble was our domestic coal, but this could not be available unless given lower rates, so that it could compete in the market with the coal shipped by water. If it could not thus compete, it could not be relied on as a supply in

an emergency. The low rate in this case was given on coal shipped to Louisville, because it there came in competition with coal brought down the Ohio river. The railroad commission was the only tribunal authorized to relieve appellant from the operation of the section. No such power was vested in the courts. The question of competition could not be examined there, nor could it be shown that a proper case existed for exoneration from the section. The Legislature therefore provided for the preliminary hearing before the railroad commission, not as a cumulative remedy, but that it might determine whether the carrier should be exonerated or not; and therefore it was provided that, if the commission relieved the carrier from the operation of the section, no prosecution should be had on account of the matter complained of. It also further provided that, if the commission failed to exonerate the carrier, it should make an order in writing to that effect, and furnish 'a statement of the facts, together with a copy of its order, to the grand jury of any county, the circuit court of which has jurisdiction, in order that the railroad company or carrier may be indicted for the offense.' The requirement that the commission should furnish the grand jury a copy of its order, in order that the railroad company might be indicted for the offense, must be read in connection with the previous clause—that, if the company was exonerated, the railroad company should not be prosecuted. The plain meaning of the two together is that the railroad company may be indicted for the offense if not exonerated, and may not be indicted if it is exonerated, and the copy of the order of the commission refusing to exonerate it is required to be furnished to the grand jury in order that the company may be indicted." It is no answer to this reasoning to say that, four years before the indictment in question was found,

the commission had decided other cases under section 820, involving freight rates between the same localities, against the railroad, and recommended its indictment and punishment therefor.

The problem of competition in railroad traffic is an ever-varying one, and the decision of the commission at any given time could, of necessity, only determine the condition of the question at the time of its promulgation, and prior thereto. Of the future, unless they possessed the gift of prophecy, they could not determine. The same necessity for a thorough examination of the circumstances and conditions of competition would exist at any subsequent time as at the original investigation, unless we are to suppose that there are never any changes in the status of railroad competition. On the contrary, common experience teaches us that what would be a righteous decision on the question of competition of freights between localities at any given time might be iniquitously unjust at a subsequent time; and therefore it is impossible to suppose that the lawmaking power meant that the declaration of the commission in refusing to exonerate appellant from the provisions of section 820 at any given time was to act as a formal declaration of war on it, under which letters of marque and reprisal were to be issued and enforced by the grand jury along its line until such time as peace might be declared by a new edict of the commission. Such a conclusion would be crude and unscientific, and does violence to the plain letter of the statute.

Section 820 gives the remedy for violation of section 218 of the Constitution, and it comes within the familiar rule of construction that, when a statute gives a remedy, it is usually exclusive, or as said in *The Illinois Central Railroad Company v. The Commonwealth*, *supra*, "the Legisla-

lature provided, therefore, for the preliminary hearing before the railroad commission, not as a cumulative remedy, but that it might determine whether the carrier should be exonerated or not."

There is nothing in the principles enunciated in the cases of *The Louisville & Nashville Railroad Company v. The Commonwealth*, 104 Ky., 226 (20 R., 491) 46 S. W., 707, 47 S. W., 210, 598, 43 L. R. A., 541. *The Louisville & Nashville Railroad Company v. The Commonwealth*, 106 Ky., 633 (21 R., 232) 51 S. W., 164, 1012, or *The Louisville & Nashville Railroad Company v. The Commonwealth* (21 R., 239) 51 S. W., 167, inimical to the views herein expressed. In each of these cases a trial was had before the railroad commission, and a judgment refusing to exonerate the railroad rendered, as a prerequisite to the indictment by the grand jury. In each case the indictment was returned on the advice or suggestion of the commission. So far as these cases illustrate anything in the case at bar, they tend to bear out the necessity for an investigation by the commission as a condition precedent to an indictment in every case. They certainly do not militate against this view, as the slightest examination will show. The question of the necessity for an investigation by the commission as a prerequisite to an indictment never arose in this court until the *I. C. R. R. v. The Commonwealth*, *supra*. The principle announced in the case at bar is the principle of *The I. C. R. R. v. Commonwealth* carried to its natural and legitimate conclusion.

The guilt of the railroad in any given case does not depend on the commission, or on its rules and regulations, but on the question whether the corporation has or has not violated the provisions of section 218 of the Constitution. The investigation of the commission only establishes the fact as to whether it has or has not violated said sec-

tion. In reaching their conclusion as to whether the corporation is guilty or innocent, the commission examines into the question as to whether or not the conditions and circumstances are substantially similar. If so, the corporation is guilty; if not, it is innocent. As the guilt or innocence of the corporation depends on the existence or non-existence of facts, which are, or at least may be, ever-varying, it follows, as a legal and logical sequence, that, if the corporation is to have the benefit of these ever-varying conditions before it is indicted, such investigations must be had in each and every case, as a prerequisite to an indictment.

We conclude, therefore, that the investigation of the railroad commission, and an adverse decision by it against the railroad, are necessary, in every case, before an indictment can be had under section 820 of the Kentucky Statutes; that no declaration of the commission on the subject of competition in freights can be projected into the future, but must act alone on the present and the past. This construction, we think, is in harmony with the act in question. We believe that it puts into the hands of a brave, intelligent and zealous commission ample power to repress the wrongs of the railroads sought to be remedied, and yet relieves these corporations from the wanton assaults of narrow sectionalism or of greedy cupidity. It gives opportunity for the development of the mines and the manufacturing of the State, for the expansion of its commerce, and affords to every locality such protection against invidious discrimination as is consistent with the general uplift and prosperity of the State—an uplift and prosperity whose reflex benefit, it is believed, will more than repay the given locality for any sacrifice it makes in favor of the common good.

The court below should have sustained the motion of appellant for a peremptory instruction. Wherefore the case is reversed for proceedings consistent with this opinion.

Judge Paynter's concurring opinion:

The only part of this opinion in which I concur is that the case of *The Illinois Central Railroad Company v. Commonwealth*, 23 R., 1159, 64 S. W., 975, controls in this case, and that therefore the peremptory instruction should have been given to find for the appellant. I do not assent to some of the statements and expressions in the opinion, nor do I agree with any statements therein which are, or seem to be, in conflict with previous opinions of this court construing section 218 of the Constitution.

I dissented from the opinion of the court in *The Illinois Central Railroad Co. v. Commonwealth*, 23 R., 1159, 64 S. W., 975, upon the idea that the Legislature in the enactment of section 820 had gone farther than it was authorized to go by section 218 of the Constitution. Section 218 of the Constitution reads as follows: "It shall be unlawful for any person or corporation owning or operating a railroad in this State, or any common carrier, to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of property of like kind, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance; but this shall not be construed as authorizing any common carrier, or person or corporation, owning or operating a railroad in this State, to receive as great compensation for a shorter as for a longer distance; provided, that upon application to the railroad commission, such common

carrier, or person or corporation, owning or operating a railroad in this State, may in special cases, after investigation by the commission, be authorized to charge less for longer than for shorter distances for the transportation of passengers, or property; and the commission may, from time to time, prescribe the extent to which such common carrier, or person or corporation, owning or operating a railroad in this State, may be relieved from the operation of this section." Section 820, Kentucky Statutes, reads as follows: "If any person owning or operating a railroad in this State, or any common carrier, shall charge or receive any greater compensation in the aggregate for the transportation of passengers or property of like kind, under substantially similar circumstances and conditions, for a shorter than for a longer distance, over the same line in the same direction, the shorter being included within the longer distance, such person shall, for each offense, be guilty of a misdemeanor, and fined not less than one hundred nor more than five hundred dollars, to be recovered by indictment in the Franklin Circuit Court, or the circuit court of any county into or through which the railroad or common carriers so violating runs or carries on its business. Upon complaint made to the railroad commission that any railroad or common carrier has violated the provisions of this section, it shall be the duty of the commission to investigate the grounds of complaint, and if, after such investigation, the commission deems it proper to exonerate the railroad or common carrier from the operation of the provisions of this section, an order in writing to that effect shall be made by the commission, and a copy thereof delivered to the complainant and the railroad or common carrier and the same shall be published as a part of the report of the commission; and after such order, the railroad

or carrier shall not be prosecuted or fined on account of the complaint made. If the commission, after investigation, fails to exonerate the railroad or carrier from the operation of the provisions of this section, an order in writing to that effect shall be made by the commission and a copy thereof delivered to the complainant and the railroad or common carrier, and the same shall be published as a part of the report of the commission; and, after such order, it shall be the duty of the commission to furnish a statement of the facts, together with a copy of its order, to the grand jury of any county, the circuit court of which has jurisdiction, in order that the railroad company or carrier may be indicted for the offense; and the commission shall use proper efforts to see that such company or carrier is indicted and prosecuted."

In *Illinois Central Railroad Company v. Commonwealth*, the question before the court, as stated by it, was "whether, under the statute, the carrier may be indicted by the grand jury before the railroad commission has refused to exonerate it." In that case complaint had not been made to the railroad commission before the indictment was found, and the court decided that it was necessary that the railroad commission should act upon a complaint, and refuse to exonerate the carrier, before an indictment could be found. In discussing the matter, the court said: "If the Legislature had intended an indictment to be found for each offense, regardless of action by the railroad commission, we see no reason why this section might not have stopped with the first sentence, defining the defense and providing for its punishment. . . . To indict the carrier in the first place without the action of the railroad commission would be to deprive it of all benefit of this

provision. . . . The Legislature therefore provided for the preliminary hearing before the railroad commission, not as a cumulative remedy, but that it might determine whether the carrier should be exonerated or not; and therefore it was provided that, if the commission relieved the carrier from the operation of the section, no prosecution could be had on account of the matter complained of." Again the court said: "To allow the carrier to be indicted in advance of any action by the railroad commission under this section would be to deprive it of all opportunity for exoneration." As I understand the facts, no complaint was ever made to the railroad commission that the appellant had been guilty of the unlawful act for which it was indicted. The railroad commission therefore never had an opportunity to determine whether or not an indictment should be found against it.

The court refusing to recede from its position in that case, the question then arises, should a member of this court disregard that opinion in order to sustain this prosecution? I am unwilling to do so. It appears that complaints in other cases were filed with the railroad commission, to the effect that the appellant had violated section 820 of the Kentucky Statutes in the matter of the transportation of coal to Lebanon; and, as the railroad commission refused to exonerate in those cases, therefore it must be held as having refused to exonerate the railroad company from its unlawful act here in question. The court, in the Illinois Central case, held that section 820 of the Kentucky Statutes was constitutional. This act denounces a penalty for any violation of it. It means to make a carrier liable to prosecution for any violation of it in the transportation of the property of any individual, corporation, etc. It is contemplated by the section that some one

shall make complaint to the railroad commission, so that it shall act upon the complaint. It is called upon under that section to determine whether the carrier shall be exonerated from the act of which complaint is made. It is provided in the section that, if the commission refuses to exonerate the carrier, an order in writing to that effect shall be made, and a copy thereof made and delivered to the complainant and carrier; and it is further the duty of the commission to make a statement of the facts, and furnish that, together with its order, to the grand jury of the county, etc. If the opinion of the court is correct in the Illinois Central case, then the carrier is entitled to a hearing before the railroad commission on any complaint that is made of its violation of the section of the statute, and the grand jury can not return an indictment until the railroad commission has passed upon the question and refused to exonerate. Section 218 of the Constitution authorizes the railroad commission in special cases, after investigation, to allow carriers to charge less for the long than the short distance, etc., and may prescribe the extent to which such common carrier may be relieved from the operation of that section of the Constitution. A "special case" referred to in that section might embrace a case for all the coal hauled to Lebanon from some point south of there, or it might embrace a case for the transportation of all wheat that might be transported there. It was not intended to restrict it simply to permission to some carrier to make a single shipment, and charge less for the long than for the short haul. This provision of the Constitution authorizing the railroad commission to consider special cases, etc., is not for the purpose of allowing it to determine whether the carrier shall be indicted for past offenses, but is for the purpose of allowing it to

determine whether or not it shall be entitled to charge less for the longer than for the shorter distance for the transportation of passengers, property, etc., and to determine to what extent the common carrier should be relieved from the operation of the section. This section does not attempt to confer upon the railroad commission the right to relieve against previous acts, but to give it the authority to make it lawful for the carrier to charge more for the short than for the long haul. If the carrier charges more for the short than for the long haul, under substantially similar circumstances and conditions, under section 218 of the Constitution, it is guilty. It can only be guiltless under that section, for such acts, when the railroad commission has authorized it to charge less for the longer than for the short distance, or it has been relieved from the operation of the section. This section is dealing with the future, not the past, acts of the carrier. Section 820 of the Kentucky Statutes allows the commission to exonerate the carrier from a single act which it has done in violation of the statute, although the carrier had not previously been authorized to charge less for the long than for the short haul. This section is predicated upon the idea that the railroad commission has not given the carrier the right to charge less for the long than the short haul; that the carrier for that reason may have violated section 218 of the Constitution. Section 820, Kentucky Statutes, has reference to past acts, while section 218 of the Constitution is dealing with future ones.

My opinion is that section 820 of the Kentucky Statutes did not conform to the requirements of the Constitution, for reasons in part above indicated; hence I dissent in the Illinois Central case. The pardoning power is not vested in the railroad commission by the Constitution, but in the

Governor. However, as that opinion is the law, it should be respected by this court, and the court should not allow a punishment to be inflicted upon a carrier in disregard of the law as adjudicated therein. If this court refuses to follow the law as determined by it, such refusal is not calculated to beget respect for its opinions. Being of the opinion that, under the rule of the Illinois Central case, the appellant was entitled to peremptory instruction, I concur in the opinion in this case to that extent only, as the opinion in that case is as binding upon me as if I had originally agreed to it.

To preserve the unity of history, I desire to add the following to my concurring opinion:

In the Illinois Central case the court had under consideration an indictment which described the offense in language as follows:

"The said Illinois Central Railroad Company, a railroad corporation owning and operating now and at the time hereinafter mentioned, a line of railroad extending from Deanfield, Ky., through Stephensburg, Ky., and Hardin county, Ky., to Louisville, Ky., did, on the — day of October, 1898, and within twelve months before the finding of this indictment, in the said county of Hardin, unlawfully charge and receive of W. H. Oliver for the transportation of a carload of coal over said railroad from said Deanfield to said Stephensburg the sum of \$35.40, being at the rate of six cents per hundred pounds, when for the transportation of a similar car load of coal of like kind from said Deanfield to said Louisville, under substantially similar circumstances and conditions, over the same line in the same direction, said Illinois Central Railroad Com-

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pany did at said time charge and receive of various persons less compensation than six cents per hundred pounds, the distance from said Deanfield to said Stephensburg being shorter than and included in the distance from said Deanfield to said Louisville, and defendant, at said time, not having been authorized by the railroad commission of this Commonwealth to charge less for the transportation of coal for said longer than for said shorter distance."

The charge in the indictment was for charging W. H. Oliver more for the short than other persons were charged for the long haul, etc. It was a single shipment under consideration. The word "exoneration" is not used in section 218 of the Constitution. It appears in the statute only. Exoneration is therefore only provided for in the statute. Exoneration is "the state of being disburdened or freed from a charge." It is something that is supposed to take place after a charge has been made. The carrier for making a charge against the prohibition of section 218 of the Constitution is guilty of its violation whether the railroad commission has been called upon to relieve the carrier from its operation, and refused to do so, or has never been called upon to determine whether or not it should be relieved from its operation. When the railroad commission refuses to relieve the carrier from the operation of section 218 of the Constitution, the matter stands as if no action had been taken whatever.

Judge Nunn dissents.

Judge Hobson's dissenting opinion:

To properly understand the questions before us in this case, it is necessary to review the previous decisions of this court construing the section of the statute in contro-

versy, and the provision of the Constitution it was designed to carry into effect. In the first case (*Louisville & Nashville Railroad v. Commonwealth*, 104 Ky., 226 (20 R., 491) 46 S. W., 707, 47 S. W., 210, 598, 43 L. R. A., 541) it was insisted that the existence of competition at the terminus of the longer haul, of itself, took the case out of the operation of the statute and the constitutional provision; but it was held that the difference of circumstances and conditions contemplated by these provisions did not include extrinsic facts not connected with the carriage in any way, such as existence of competition at one point, and not at another. In that case it was also contended that the special case from which the carrier might be exonerated meant a special shipment, and that therefore it was necessary to aver in the indictment the amount charged and received for the longer haul, and the name of the person thus favored. The court held otherwise, on the ground that the gravamen of the offense is charging for the shorter haul a greater rate than the prevailing rate for the longer haul. The court said: "Nor was it necessary to designate any particular person or persons, probably numerous, than whom Shreve had been charged and required to pay greater compensation; for section 218 (Constitution) was intended to prevent discrimination rather between localities than between persons. So, in order to convict of an offense like the present, it suffices to state in the indictment that the specified amount charged or received for the shorter distance was greater than that charged or received from persons generally or usually for the longer distance, and to support the allegation by the carrier's published schedule of rates, or other competent evidence of the

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fact." In the next case (Louisville & Nashville Railroad v. Commonwealth, 106 Ky., 633 (21 R., 232) 51 S. W., 164, 1012) the preceding case was adhered to. But that case had been prepared with a view to an appeal to the United States Supreme Court, and the question was again raised as to what was the special case referred to in section 218 of the Constitution, and what was the meaning of the words "complaint" and "exoneration" in section 820 of the Kentucky Statutes. The question before the court was whether these words referred to each shipment of freight, or to discrimination in rates between localities. In other words, could the carrier be exonerated as a special case on certain class of freight between given points, or must he be exonerated on each shipment to any individual—whether a barrel of pork, a box of dry goods, or a car of coal? If the latter, it was said that the statute gave the carrier no practical protection at all, because he could not be exonerated on any shipment until it was made, and his exoneration on that shipment was of no effect on any other shipment, so that he could never know how to conduct his business, and therefore the statute was not in accord with the Constitution, because it afforded no practical means of exoneration from the section. In answer to all this, the court said: "It was the aim of the Constitution to require the railroads in the State to treat all localities fairly and with equality; but as differences of condition, ever-varying, would constantly arise, it prescribed no fixed rule, but created a tribunal to act as umpire between the railroads and the people, and decide when and to what extent a greater charge might be made for a short than for a long haul under like circumstances and conditions, with full power in special cases, from time to time to pre-

scribe the extent to which such common carrier or person or corporation owning or operating a railroad in this State may be relieved from the operation of this section. It is not confined in its power to each shipment as it may be made, but may prescribe from time to time a suspension of the section on freight of a given character between given points, as the public interest and the ends of justice may require." In the third case (*Louisville & Nashville Railroad Company v. Commonwealth* (21 R., 239) 51 S. W., 167) the question was made by the railroad company that the order of the railroad commission was improperly admitted in evidence against it. On the other hand, it was insisted by the Commonwealth that the order of the commission was properly admitted in evidence, as it was the basis of the proceeding. Although there had been some differences in the court on the other questions, on this question the whole court concurred in the judgment, that the order of the commission was properly admitted in evidence. This question had been made by the railroad company before in the first case, which had been affirmed, but in that case the railroad company insisted that the averments of the indictment were not sufficient to show that the railroad commission had refused to exonerate it. The court held the indictment sufficient. Of course it was not claimed by the court or by counsel that the order of the railroad commission was competent to be read to the jury unless it was a prerequisite to the prosecution, and the basis of it. For it could not be competent on any other ground. And the admission of it was very prejudicial, if it was incompetent, for it served to put the defendant in a bad light before the jury, and in that case the jury had inflicted a very heavy fine.

Taking these three cases, in which all the court concurred, so far as the questions now before the court go, what do they establish? (1) That section 218 of the Constitution, and the statute made to enforce it, were "intended to prevent discrimination rather between localities than between persons; that it was the aim of the Constitution to require the railroads of the State to treat all localities fairly and with equality." (2) That in special cases the commission might exonerate the carrier, but it was not confined in its power to each shipment as it might be made, but might prescribe from time to time, a suspension of the section on freight of a given character between given points, as the public interest and the ends of justice required. (3) That the order of the railroad commission refusing to exonerate the carrier was the basis of the prosecution.

After all this had been settled, the case of Illinois Central Railroad v. Commonwealth of Kentucky, 23 R., 1159, 64 S. W., 975, arose; and in it the court was urged, notwithstanding what it had previously decided, to hold that the order of the railroad commission was not the basis of the proceeding, and that a prosecution might be maintained before any order had been made by the railroad commission refusing to exonerate the carrier. The court refused to recede from its previous opinion, and this is all that was decided in that case. No question was made in that case by court or counsel as to the necessity of an exoneration of the carrier, or a refusal to exonerate him, for the shipment of a particular carload of coal, or a shipment to a particular person. The court had previously held unanimously, so far as that question went, that the exoneration need not be on each shipment, but might be on a given character of freight

between given localities. In the opinion of the court the precise question that was in the mind of the court is shown by its statement of the case in these words: "Appellant was indicted in the Hardin circuit court, and fined two hundred dollars, for charging more for hauling a carload of coal from Deanfield, Kentucky, to Stephensburg, Kentucky, than from Deanfield, through Stephensburg, to Louisville. The indictment was returned June 10, 1899. At that time the railroad commission had not determined whether appellant should be exonerated as provided by statute. The first question to be determined on the appeal is whether, under the statute, the carrier may be indicted by the grand jury before the railroad commission had refused to exonerate it." When the court used the words "exonerate," and "exoneration," it used them in the sense in which those words had, after the fullest deliberation, been defined by the entire court,—as not referring to a particular shipment, but to a difference of rate between localities. This case merely adhered to the rule that had been before laid down, changing it in no particular, and, with the preceding cases, made out what seems to be a reasonable construction for both the carrier and the shipper, giving both some practicable protection from the statute. When it was decided, the railroad commission, pursuant to the rule before laid down, had made general orders exonerating carriers on coal between certain points, but the Illinois Central Company was indicted before action was taken as to it. The carrier need not be exonerated from each shipment that he makes, but may be exonerated on the rate of a given class of freight between certain points, and this exoneration remains in force until changed by the railroad commission. So that the carrier, when his rights have thus been defined, can safely

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carry on his business without incurring criminal liability until the commission makes some further order, and after that is made he must conform to it. On the other hand, the shipper, when the commission has refused to exonerate the carrier, may appeal for his protection to the grand jury of his county to indict the carrier for extorting money from him which it has no right to charge. In this way obedience to the orders of the commission is secured, shippers are protected, and at the same time the carrier can not be put to the cost of criminal prosecution without action by the railroad commission determining that a state of facts does not exist, justifying the exoneration of the carrier from the operation of the long and short haul clause; nor can he be deprived of a hearing on this question, as he would be if he might be indicted in advance of action by the railroad commission, for the evidence on this subject can not be introduced before the jury, as only the railroad commission has power to exonerate from the section.

In the majority opinion, as well as in the separate concurring opinion, none of the three first cases decided by the court are criticised or overruled, and it must be assumed from this that the court does not mean to overrule those cases. Putting those cases by the side of the opinion which is now delivered, the court places itself in a very anomalous position. It is thus held, on the one hand, that the word "complaint" and the word "exonerate," in the statute, where the carrier is exonerated, do not refer to the particular shipment by a particular shipper, but to a discrimination between localities, in giving a less rate for the long than for the short haul. And it is at the same time held that the same words in the same statute, where the carrier is not exonerated, do refer to the particular shipper, and not to

the discrimination between localities by the giving of a lower rate for the long than for the short haul. Certainly the court can not maintain such a position that the same words in the same statute have one meaning in favor of the carrier, and a different meaning against the carrier. But if the court's decision in this case is to be taken as overruling the previous cases, and determining that the words "complaint" and "exonerate," in the statute, refer to the particular shipper, either in favor of the carrier or against it, then it will follow that the exoneration of the carrier is of no service to it, except as to the particular shipment in controversy, and he can be indicted for the next shipment, and will never know in advance how intelligently to carry on his business. If such had been the legislative intent, there was no need in the statute to require action by the railroad commission before the carrier could be indicted, nor reasonably would such a heavy penalty have been imposed. The court's opinion, construing the statute to mean that the carrier could not be indicted before the commission had declined to exonerate it, rests, in the end, upon the construction of the statute made in the previous cases,—that the exoneration was not from a particular shipment, but as to the rate on the article in question between the localities.

Much has been said in the case about the hardship of it, but, when the court of last resort is influenced by such considerations as this in the construction of a statute, who shall stand up for the sanctity of the law, which, after all, is the protecting aegis of life, liberty and property? But there is no such hardship as supposed. If the commission exonerates the carrier, this order continues in force until revoked by the commission, and until then both the

carrier and the shipper know how to order their affairs. It is the duty of the carrier to conform to the order of the commission, where it refuses to exonerate. If a change of circumstances arises, either the carrier or the shipper can bring the matter to the attention of the commission, and have the question reinvestigated. In the first case it was objected to the statute, among other things, that it gave the carrier no right to complain, and was therefore inconsistent with the Constitution; but the court held that the provision of the Constitution was to this extent self-executing, and that either the carrier or the shipper could complain. *L. & N. Railroad v. Commonwealth*, 104 Ky., supra. If, after the commission refuses to exonerate the carrier, he, in disobedience of its order, continues his discrimination, the state of case arises which the Legislature contemplated in section 820, and which it, by its severe penalties, undertook to prevent. To construe the statute to mean that the carrier can not be indicted without action by the railroad commission, and that it can only be indicted then as to the particular shipment it has investigated, is to deny the people of the State all reasonable protection from the statute. It seems to me that there is no reason for departing now from the conservative middle line which the court has heretofore laid down, to which the business of the State has been adjusted, and which gives a reasonable protection to both the shipper and the carrier.

The separate concurring opinion is devoted mainly to showing that the court was wrong in the case of *The I. C. Railroad v. Commonwealth*. Space does not permit a reargument of the question then decided. Suffice it to say that, if the statute is unconstitutional, it is the only

authority of the court for inflicting criminal punishment. The penalties therein denounced are the punishment of the acts therein provided for, and it does not follow, by any means, that the Legislature would have provided these penalties for a greater charge for the short than for the longer haul, unless it had provided for an exoneration of the carrier; for the plain purpose of the section was to provide a modus for carrying into effect the provisions of the Constitution, and to provide an adequate penalty to secure respect for the orders of the commission. It is not one of those cases, therefore, where the court could reject part of the statute as unconstitutional, and enforce the remainder. The case of Illinois Railroad v. Commonwealth was written upon the idea that this court had settled that the exoneration of the carrier was not as to each shipment, but as to the rate between localities, and that an exoneration once made thereon protected the carrier until this order of the commission was revoked. The court then merely followed its previous ruling. It did not decide that there must be a refusal to exonerate on each shipment before an indictment of the carrier could be had. The doctrine now announced is not warranted by anything in that opinion, but, on the contrary, is a departure from the principles on which that opinion is based. The ground of that decision was simply that, as the exoneration or refusal to exonerate went to the rate between the localities, the commission was to pass on the rate before the carrier could be indicted. If the commission approved the rate, there could be no indictment. If it refused to exonerate the carrier, he might be indicted, not only for what he had done, but for what he might do thereafter, in violation of the ruling of the commission. One reason which the Leg-

islature probably had in mind in framing the statute as it did was that emergencies might arise when immediate action by the carrier might be necessary before the commission could decide; and it was allowed, at its peril, to trust to the commission giving an exoneration, if it saw fit, where the public necessities demanded it, as in the case of a coal famine, or the burning of a town, or the like. The commission was given general supervision over the matter, as it had been before, and it was supposed that no great harm in this way could be done, as complaint might be made any time to the commission.

As heretofore construed by the court, the carrier can not suffer unduly, and may safely carry on his business after the commission has once acted; and, on the other hand, the shippers are adequately protected by the power to indict and punish the carrier not only for all violations of the order of the board, but for his previous acts, if he is not exonerated.

The order of the board made in 1899 in this case, by its terms following the decision of this court, exonerated the carrier from that time and for the future, and until the further order of the board. It does not purport, on its face, to have any retroactive effect. The commission did not assume to exercise condoning power. It has no such power. It has only the power of exoneration, and, when it refuses to exonerate, its order must be obeyed while in force; and, if it is not obeyed, the carrier can only appeal for pardon to the executive as to acts done in violation of the orders of the commission.

I therefore dissent from the judgment of the court.

Judge Settle concurs in this dissent.

Petition for rehearing overruled.

CASE 91—ACTION BY FRANK EBLIN AND OTHERS AGAINST THE ILLINOIS CENTRAL RAILWAY COMPANY TO RECOVER DAMAGES IN TRANSPORTING TWO CARLOADS OF HORSES.—FEB. 11.

Illinois Central Ry. Co. v. Eblin and Others.

APPEAL FROM HENDERSON CIRCUIT COURT.

JUDGMENT FOR PLAINTIFFS AND DEFENDANTS APPEAL. AFFIRMED.

CARRIERS—LIVE STOCK SHIPMENT—FACILITIES FOR FEEDING AND WATERING—OWNER ACCOMPANYING—LIABILITY OF CARRIER—EVIDENCE.

- Held: 1. In an action by a shipper of horses against the carrier for damages to the animals from the length of time they were on the cars without feed and water, and from failure to furnish proper facilities for feeding and watering them, statements of defendant's agents at the shipping point, made as an inducement to ship over their line, as to what facilities defendant would furnish for watering and feeding the stock while en route, and what time would be required for the journey, are competent testimony, they not tending to vary the contract or alter the terms of the bill of lading.
2. Though the shipper of stock agrees to accompany and feed and water it, the carrier is liable for damage thereto from failure to furnish proper facilities for feeding and watering.

S. B. & R. D. VANCE, LOCKETT & LOCKETT AND PIRTLE & TRABUE, FOR APPELLANT.

QUESTIONS DISCUSSED.

1. Where the contract for shipment of horses over a railroad is reduced to writing, parol evidence as to the statements of the agent of the railroad company, made at the time the contract was made, is not admissible to contradict or vary the terms of said contract.

2. Where a shipper agrees with the railroad company to feed, water and take care of his stock at his own expense and risk;

114	817
1127	654
114	817
137	281

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while it may be the duty of the railroad to furnish facilities (a place) to feed, water and take care of said stock, if the railroad fails to furnish such facilities, it is the duty of the shipper to make some effort to obtain the requisite facilities and if he fails to do so, and his stock suffers thereby, he is not entitled to recover any damages therefor of said railroad company on account thereof, and a peremptory instruction in favor of railroad company should be given.

3. The burden is upon the shipper to show that he tried to obtain the proper facilities for feeding and watering stock at stopping place or that the same could not be had.

4. When a railroad fails to furnish facilities for feeding and watering horses at a stopping station when shipper has charge of stock it is the duty of the shipper to obtain same and the criterion of damages is the reasonable costs of such facilities.

5. When shipper agrees that the railroad shall not be liable for any injury that horses may do each other (gross negligence of railroad excepted), and the horses are unloaded at a station for the purpose of being fed, watered and rested, if the shipper reloads his stock without having fed, watered or rested same, or made some effort to procure facilities for feeding, watering and resting stock, if the same are not furnished by the railroad and, especially if the shipper knows by experience that the stock will injure each other, if not fed and watered, the shipper is guilty of contributory negligence and not entitled to recover for any injury the stock may do each other by reason thereof.

6. The verdict is contrary to the law and evidence.

7. The damages are excessive and must have been awarded by passion and prejudice.

AUTHORITIES CITED.

2 Greenleaf, 15th ed., vol 1, sec. 275 and notes; 2 Greenleaf, 15th ed., vol 1, sec. 87; Am. & Eng. Ency. of Law, vol. 8, p. 604.

YEAMAN & YEAMAN AND A. O. STANLEY, FOR APPELLEES.

QUESTIONS DISCUSSED AND AUTHORITIES CITED.

Common carriers can not limit their liability for damages done by their own negligence to property they have in charge for transportation. L. & N. Ry. Co. v. Owen, 93 Ky., p. 203;

Illinois Central Ry. Co. v. Eblin and Others.

Rhodes v. L. & N. Ry. Co. 9 Bush, p. 688; Baughman v. L. & N. Ry. Co. 94 Ky., 150; L. & N. Ry. Co. v. Brownlee, 14 Bush, 600; Hart v. Pennsylvania Ry. Co., 113 U. S., p. 331; Elliott on Railroads, vol. 4, secs. 1511, 1557; Sunderland on Damages, vol. 3, sec. 904; 9 Ky. Law Rep., 814; L. & N. Ry. Co. v. Hawley, 10 Rep., 117; Harmon & Crockett v. Norfolk R. R. Co., 295 and 296; Clark v. Rochester & L. R. R. Co., 67, Am. Dec., 205.

It is the duty of common carriers of stock to provide proper facilities for resting, feeding and watering same while in transit, and a failure to provide such facilities is negligence. Elliott on Railroads, vol. 4, secs. 1552, 1553; White v. Cincinnati, &c. Ry. Co., 89 Ky., 478; Owen & McKinney v. L. & N. Ry. Co., 93 Ky., 626; Harmon & Crockett v. Norfolk and W. R. R. Co., 44 L. R. A., 290; Walker, &c. v. Keenan, 34 U. S. App., 691, 73 Fed. Rep., 759; Gulf C. & F. R. R. Co. v. York, 2 Texas App. Civ. Case P., 813, p. 718; The Mo. P. & R. R. Co. v. Ivy, 79 Tex., 444; Covington Stock Yards Co. v. Keith, 139 U. S., 128; McCullough v. Wabash Western Ry. Co., 34 Mo. App., 23; Mason v. Mo. Ry. Co., 25 Mo. App., 473; Cooke v. Kansas City Ft. S. & M. R. R. Co., 57 Mo., App., 471; Kansas P. R. R. Co. v. Reynolds, 8 Kansas, 623.

OPINION OF THE COURT BY CHIEF JUSTICE BURNAM—AFFIRMING.

This is an appeal from a judgment of the Henderson circuit court in an action instituted by the appellees, Frank Eblin, etc., against the Illinois Central Railroad Company, for damages alleged to have been done to two car loads of horses while being transported over the defendant's line of road from Omaha, Neb., to Henderson, Ky. As their cause of action the plaintiffs allege in their petition that at the time of making the contract for the shipment of their horses the defendant, through its authorized agents, agreed to deliver the horses at Decatur, Ill., in not less than 32 hours after leaving Omaha; and that they would furnish at that point ample opportunity for unloading, feeding and watering the horses; and that the horses should remain at Decatur not less than 12 hours, in the pens of the com-

pany, for feeding, watering, and resting; and that thereafter they would be transferred to Henderson, Ky., in not less than 24 hours after leaving Decatur; and that the defendants failed to perform their agreement to deliver the horses at Decatur in 32 hours, and also failed to furnish sufficient means for feeding and watering them at that point, or to afford facilities for their remaining at that point 12 hours; and that they also failed to transport them to Henderson within 24 hours after leaving Decatur; and that by reason of this breach of contract on the part of the defendant their horses were kept in the cars between Omaha and Decatur for 46 hours without food or water or rest, and, after leaving Decatur, were kept for more than 30 hours without food, water or rest; and that by reason of this treatment on the part of the defendant their horses were famished and starved to such an extent that they lost flesh rapidly, and in their extreme hunger and thirst devoured their manes and tails; and that when they landed in Henderson they presented a gaunt and famished condition which materially depreciated their usefulness and salable value; that two of them died on the road; and altogether they were damaged in at least the sum of \$600. The railway company, by way of answer, alleged that it was expressly provided in the contract of shipment that the cars containing the stock were to be in charge of the shipper or his agent while in transit; that the railroad company should not be liable for any injury the animals might do to each other, or loss not resulting from the gross negligence of the railroad company; that the shipper should at all times feed, water and take care of said stock at his own expense and risk; that the railroad company should not be liable for damages resulting from the delay of trains

unless the same was caused by their gross negligence, and put in issue all the affirmative allegations of the petition for relief tending to show a breach of the contract of shipment. The issues were made up by reply and rejoinder, and a trial before a petit jury resulted in a verdict for plaintiff for \$600, and the defendant appeals.

The chief grounds relied on for reversal are that the trial court erred in admitting evidence of the statements of the agent of defendant at Omaha as to what the company would do in the way of furnishing facilities for watering and feeding the stock while en route, and the time that would be required for the journey; and that the verdict is flagrantly against the weight of evidence, and contrary to the instructions. The testimony for the plaintiffs is to the effect that the horses were shipped from Baker City, Or., to Omaha, Neb., a distance of about 1,700 miles, in eight days; that during the journey they were stopped and unloaded three times, and allowed to rest and feed each time about 24 hours; that they arrived at Omaha in good condition; that the agent of the defendant company at Omaha represented to the plaintiffs that they would deliver the cars in Decatur, Ill., in 32 hours, where abundant facilities for feeding and watering them would be furnished, and where they would be allowed to remain in the pens for rest and exercise, after being unloaded, 12 hours, and would then reach their destination at Henderson, Ky., in 24 hours after leaving Decatur; that as a matter of fact the horses left Omaha at 11:30 Tuesday night, and arrived at Decatur at 9:30 p. m., Thursday, having been on the road about 46 hours; that when they arrived at Decatur they were directed by the agents of the company to unload their stock in a lot about 35 feet square, which contained no mangers

or water troughs; that, although they had ordered 600 pounds of hay before they got to Decatur, the company only furnished about 150 pounds, which was scattered around the edges of the lot; that the only facilities for watering the horses were two washing tubs; that the water was carried in two buckets from an engine, and poured into the tubs; that the horses soon broke down one of the tubs, also one side of the pen fence, compelling them to remain to prevent their escape; that only a part of the horses got any water at all; that the lot was so crowded that many of them got no hay; that, after remaining in Decatur about 4 hours, they were directed to load their horses; that they left Decatur at 1:30 a. m. on Friday morning, and arrived at Henderson at 7:30 on Sunday morning; that when they arrived at Henderson two of the horses were dead, and that all were poor, gaunt, and famished, and had eaten off each other's manes and tails. The testimony for the plaintiff also fixes the depreciation in their value at from \$10 to \$20 per head, whilst the testimony of the defendant is to the effect that plaintiffs were notified at the time they shipped their horses that the schedule time between Council Bluffs and Evansville, Ind., a point in transit to Henderson, was 61 hours; and that they were also informed that they could feed and water at Decatur, Ill., that being about half the distance; and that this was satisfactory to the plaintiffs. The testimony of their employes at Decatur is to the effect that the horses were given 600 pounds of hay, and all the water needed; and that plaintiffs were given the privilege of remaining at that point for 24 hours, if they desired. But it is perfectly apparent, even from the testimony of the defendant, that the lot into which the horses were turned at Decatur was wholly insufficient; and that there were really

no facilities for taking care of stock at that point. We are of the opinion that the statements and representations made to the plaintiffs by the agents of the defendant at Omaha as an inducement to ship over their line was competent testimony, as it did not tend to vary the contract, or alter the terms of the bill of lading. It is not denied that the horses were on the car in transit between Omaha and Decatur about 46 hours without food or rest, and that they were more than 30 hours in transit from Decatur to Henderson, without being fed or watered. The Revised Statutes of the United States provide as follows:

"Sec. 4386 [U. S. Comp. St. 1901, p. 2995]. No railroad company within the United States whose road forms any part of a line or road over which cattle, sheep, swine, or other animals are conveyed from one State to another, or the owners or masters of steam, sailing or other vessels carrying or transporting of cattle, sheep, swine or other animals from one State to another, shall confine the same in cars, boats or vessels of any description, for a longer period than twenty-eight consecutive hours, without unloading the same for rest, water, and feeding, for a period of at least five consecutive hours, unless prevented from so unloading by storm or other accidental causes. In estimating such confinement the time during which the animals have been confined without such rest on connecting roads from which they are received shall be included, it being the intent of this section to prohibit their continuous confinement beyond the period of twenty-eight hours, except upon contingencies hereinbefore stated.

"Sec. 4387 [U. S. Comp. St. 1901, p. 2996]. Animals so unloaded shall be properly fed and watered during such rest by the owner or person having the custody thereof, or in

case of his default in so doing, then by the railroad company or owners or masters of the boats or vessels transporting the same, at the expense of the owner or person in custody thereof; and such company, owners or masters shall in such cases have a lien upon such animals for food, care and custody furnished, and shall not be liable for any detention of such animals.

"Sec. 4388 [U. S. Comp. St. 1901, p. 2996]. Any company, owner or custodian of such animals who knowingly and willingly fails to comply with the provisions of the two preceding sections, shall for every such failure, be liable for and forfeit and pay a penalty of not less than one hundred nor more than five hundred dollars. But when animals are carried in cars, boats or other vessels in which they can and do have proper food, water, space and opportunity for rest, the provisions in regard to their being unloaded shall not apply.

"Sec. 4389 [U. S. Comp. St. 1901, p. 2997]. The penalty created by the preceding sections shall be recovered by civil action in the name of the United States, in the circuit or district court of the United States, holden within the district where the violation may have been committed, or the person or corporation resides or carries on its business; and it shall be the duty of the United States marshals, their deputies and subordinates to prosecute all violations which come to their notice or knowledge.'

This prohibition against the confinement of stock transported for more than 28 consecutive hours without unloading for food and water and rest, and prescribing a penalty therefor, and for the recovery of damages, was intended to prevent cruelty to animals in interstate commerce, as well as danger to the public from diseases in animals which are to be used for food. See *Brockway v. The American*

Express Co., 168 Mass., 259, 47 N. E., 87. So rigorously has the statute been enforced in some jurisdictions, that the fact that the stockyards of the railroad company at a station were on fire when the train arrived is not held a sufficient excuse for not furnishing to a person in charge of the animals being transported thereon proper facilities for unloading them for food, rest and water, and for not stopping the cars for five hours, in accordance with the provisions of the act. See *N. C. & St. L. R. R. Co. v. Heggie*, 86 Ga., 210 (12 S. E., 363, 22 Am. St. Rep., 453). And a carrier will not be relieved from liability for a violation of the statute by the mere fact that a special contract existed, under which the shipper assumed the duty of feeding such stock, unless the railroad company in fact furnished the necessary facilities to enable the shipper to do so, as the negligence belongs to that class against which a common carrier is not permitted to contract. See *C. & O. R. R. Co. v. The American Exchange Bank, etc.*, 92 Va., 495 (23 S. E., 935, 44 L. R. A., 449), and *Comer v. Columbia, N. & L. R. R. Co.*, 52 S. C., 36 (29 S. E., 637). In the Virginia case it was held that, while the penal features of the federal statute could not be enforced in a State court, this did not prevent any who had been specially injured by its violation from recovering damages therefor; and in support of their conclusion cite *Cooley on Torts* (1st Ed.), 654; *Shearman and Redfield on Negligence*, section 3; *Dennick v. Central R. R. Co.*, 103 U. S., 11 (26 L. Ed., 439); *N. C. & St. L. R. R. Co. v. Heggie*, 86 Ga., 210 (12 S. E., 363, 22 Am. St. Rep., 453); *Grey v. Mobile Trade Co.*, 55 Ala., 387 (28 Am. Rep., 729), and numerous other authorities. The common-law rule on this subject is stated by Mr. Ray in his work on *Imposed Duties* in these words: "The carrier is liable for injuries to stock delivered it for transportation arising from a fail-

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ure to furnish proper facilities for feeding and watering them, though the shipper has agreed to accompany his stock, and feed and water them at his own risk." Hutchinson on Carriers, 222a, and Wood on Railroads (Minor), section 452b, are to the same effect.

Whilst we entertain no doubt that a civil action for damages for injuries resulting from a violation of the federal statute by a railroad can be maintained in a State court, plaintiffs have not sought to do so in this proceeding. On the contrary, they admit in their petition that they consented to a 32-hour run from Omaha to Decatur without stopping for water or food. And the statute is only considered in this proceeding as evidence upon the question of defendant's negligence in keeping the horses in transit for 46 hours between Omaha and Decatur, and 30 hours between Decatur and Henderson, and in failing to provide suitable and convenient facilities for feeding and watering them while at Decatur. There is no conflict in the proof that the horses were in good condition when they started from Omaha, or that they were in very bad condition when they arrived at Henderson; and that this was due to appellant's negligence is clear. The jury, under our system, are the sole judges of the weight and credibility of the testimony. Our duty is performed when we see that there is sufficient evidence to support their finding. We do not feel that we would be justified in disturbing the verdict on the ground that it was not supported by the proof, and appellant has failed to point out any error in the instructions in the case. In fact, they seem to state the law as favorably to appellant as the facts warrant.

Judgment affirmed.

Sims v. Commonwealth.

CASE 92—JAMES SIMS WAS CONVICTED OF THE OFFENSE OF SOLICITING LIFE INSURANCE AS AGENT FOR A FOREIGN CORPORATION WITHOUT A LICENSE FROM THE INSURANCE COMMISSIONER.—FEB. 11.

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Sims v. Commonwealth.

APPEAL FROM DAVIESS CIRCUIT COURT.

DEFENDANT CONVICTED AND APPEALS. AFFIRMED.

INSURANCE COMPANIES—AGENT SOLICITING WITHOUT LICENSE—FORMING DOMESTIC CORPORATION.

Held: 1. Kentucky Statutes, section 633, makes it unlawful for any one to solicit applications for insurance on behalf of any foreign insurance company in this State without a license therefor from the insurance commissioner of this State, and sections 641 and 664, Kentucky Statutes, defines what are insurance companies in the meaning of the law. HELD, that one who solicits insurance for any foreign insurance company in this State, though it be an assessment or co-operative company, without a license from the insurance commissioner, is liable to the penalty therefor prescribed in said section 633.

2. Under Kentucky Statutes, section 880, providing that "when articles of incorporation are filed and recorded as provided in section 779 and a certificate of that fact is issued by the secretary of State, the signers shall be deemed a body corporate," the filing of the articles of incorporation in the county, by the company represented by the defendant, does not constitute it a domestic corporation, as no copy thereof was ever filed in the office of the secretary of State as required by said section 880.

SWEENEY, ELLIS & SWEENEY, FOR APPELLANT.

LAVEGA CLEMENTS AND HAZELRIGG & CHENAULT, FOR COMMONWEALTH.

(No briefs.)

OPINION OF THE COURT BY JUDGE SETTLE—AFFIRMING.

Appellant was convicted and fined in the lower court for the offense of soliciting life insurance, as the agent of a foreign company, without first having procured a license and authority to conduct such business from the insurance

commissioner. The defense interposed was that the company represented by the appellant is not an insurance company, but merely a fraternal society, and, though the contract it makes with its members is a contract of insurance, it is claimed that the insurance is only incidental to such fraternal society, and that the corporation is exempt from the jurisdiction of the State insurance department, because it does not transact its business through soliciting agents, but only such as undertake the work of organizing and supervising local unions and lodges. Section 641, Kentucky Statutes, declares that the words "insurance company" or "insurance corporation" shall include "any association, individual, company, corporation, partnership or stock company engaged in or carrying on in any manner the business of insurance in this State except that the provisions of this chapter or article shall not apply to secret or fraternal societies, lodges or councils which are under the supervision of a grand or supreme body and secure members through the lodge system exclusively and pay no commission nor employ any agents except in the work of local subordinate lodges or councils." So the question presented for the consideration of this court is, is the appellant the agent of a corporation whose business is that of insurance or benevolence? We know of no better definition of an "insurance contract" than is found in *Commonwealth v. Wetherbee*, 105 Mass., 160, wherein it is said: "A contract of insurance is an agreement by which one party, for a consideration, which is usually paid in money, either in one sum, or at different times during the continuance of the risk, promises to make certain payments of money upon the destruction or injury of something in which the other party has an interest. All that is requisite to constitute such a contract is the payment of the consideration by the

one, and the promise of the other to pay the amount of the insurance upon the happening of an injury to the subject by a contingency contemplated in the contract." Tested by the foregoing definition, we find that the certificate of membership contained in the record, which is the form of contract used between the corporation represented by appellant and its members, is neither more nor less than a contract of insurance, for it recites that in consideration of the payment by one Wm. Smith, named therein, of a certain sum of money each and every week during the existence of the contract, the corporation would pay him a certain sum, of \$3 per week, in case of sickness or accident, and in case of his death the sum of \$55 to the beneficiaries or assigns named in the contract, upon satisfactory proof of death, filed in the office of the corporation. The certificate or policy further provides that the insured must have been in good health and free from disease at the time of application for membership. It declares that "no invalids of any kind can hold a policy in this company." It also provides that, if a member shall fail to pay his "premiums" for 30 days, he forfeits all money paid to the company, and that members in arrears receive no benefits while sick. A medical examination is required of all applicants for membership. The application is made a part of the contract, and it will be found to contain the questions that appear in all other applications for life insurance, such as the usual inquiries as to age, birth, health, family and personal history, habits, etc. In *Supreme Commandery of the United Order of the Golden Cross v. Hughes*, 114 Ky., 175, 24 R., 984, 70 S. W., 405, it was decided by this court that such a society or company as is represented by appellant is an "assessment or co-operative company," declared by section 664 of the statute to be an insurance

company engaged in the business of life insurance on the co-operative or assessment plan.

Between April 1, and July 1, 1901, 250 members were insured by this company in Owensboro, and these members did not attach themselves to a lodge to become insured, but were secured by employed agents of the company, through whom they received certificates or contracts of insurance. The lodge, so called, which seems to have been organized by those claiming membership in the company, was not established until after this prosecution was commenced against appellant. It must, therefore, have been a mere afterthought. It is apparent, too, that the filing of articles of incorporation in Jefferson county by the company represented by appellant did not constitute it a domestic corporation, as no copy thereof was ever filed in the office of the secretary of State, as required by section 880, Kentucky Statutes. Upon the other hand, it is shown, beyond question, that the company is a foreign corporation, for it styles itself the "National Industrial Benefit Endowment Company of Lynchburg, Va.," and was originally incorporated at Lynchburg Va., where its chief office is yet located. All the contracts of insurance are made in that city. All moneys that are collected and all reports that are made are sent there. Although appellant's company may be deemed an assessment or co-operative insurance company, as defined in section 664 of the statute, that fact will not relieve him from the penalty imposed by the judgment of the lower court, for as it is, beyond doubt, a foreign corporation, and in law and in fact an insurance company, he was required by section 633 of the statute, *supra*, to obtain of the State commissioner of insurance a license to represent it as agent before transacting any business for the company in this State.

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As it was admitted on the trial that appellant had not procured a license of the insurance commissioner, the judgment of conviction is affirmed.

CASE 93—ACTION BY LAURENCE PFANMILLER'S ADMINISTRATOR FOR A SETTLEMENT OF HIS INTESTATE'S ESTATE.—FEB. 11.

Holburn v. Pfanmiller's Admr.

APPEAL FROM JEFFERSON CIRCUIT COURT, COMMON PLEAS DIVISION.

JUDGMENT FOR PLAINTIFF AND DEFENDANT APPEALS. REVERSED.

HOMESTEAD—EXEMPTION—COMMITMENT TO INSANE ASYLUM—CLAIM FOR BOARD—ADMINISTRATORS—APPOINTMENT AND DUTY—SUIT TO SUBJECT REAL ESTATE TO DEBTS.

- Held: 1. One who, having a wife and infant child, and a house which he has occupied as a homestead, induces a daughter, because of the infirmities of himself and wife, and their inability to provide for themselves, to move into the house with them, and to assume its expense and care, is still a housekeeper with a family, so as to be entitled to the homestead exemption.
2. One's character of homesteader, with the attendant rights of homestead exemption, is not lost by his commitment to an insane asylum, and the death of his wife while he is there.
3. Under Kentucky Statutes, section 257, providing that, where a patient who has been supported in a State insane asylum has estate which can be subjected to debt, the commissioners of the asylum may sue for and recover the amount of his board, and subject the estate to the payment thereof, such claim is not a debt; so that on death of the patient his homestead can not be subjected thereto, though section 1707 allows the homestead of a decedent to be sold, subject to the occupancy of his widow and infant children, if a sale is necessary to pay his debts.
4. Possession of an estate by a resident decedent is not, in the absence of statutory requirement, necessary to jurisdiction for appointment of an administrator.
5. An administrator who fails in a suit to subject property of decedent to his debts is chargeable with costs.

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6. The mere fact that taxes have been assessed against real estate of deceased which are not yet due does not constitute a debt, authorizing a suit by the administrator to subject the real estate to payment thereof.

O'NEAL & O'NEAL, ATTORNEYS FOR APPELLANT.

Laurence Pfanmiller was adjudged to be insane and a pauper and sent to Central Lunatic Asylum, where he was kept until he died, December 2, 1899. He had no estate except a homestead worth less than \$1,000. Whilst he was in the asylum his wife died, leaving the homestead in the possession of one of his children. After his death his children, six sons and three daughters, sold and conveyed the homestead to appellant, William Holburn.

John H. Weller, at the instance of the asylum, was appointed administrator of Pfanmiller, and brought this suit to pay the alleged debt of the asylum and taxes for 1900, making appellant, Holburn, a party defendant, and seeking to set aside the conveyance to him and subject the homestead to the payment of said alleged indebtedness.

For appellant, Holburn, we contend:

1. The verdict of the jury at the inquest that the decedent was a *pauper lunatic*, is binding on the asylum until the pauper acquires fresh estate, or unless he had property the existence of which was unknown to the asylum authorities.

Decedent being entitled to homestead exemptions, the property descends to his children in fee simple, regardless of any debts, and consequently appellant can not be bound by any claim against the same.

3. Appellant is the holder for value without notice of any lien or recorded claim of any kind against the property.

4. Decedent left no estate to be administered upon and left no debts, consequently the appointment and qualification and subsequent actions of Weller as administrator, are utterly void.

AUTHORITIES CITED.

Schroer v. Central Asylum, 24 R., 150; Humber v. Asylum, 16 R., 755; Sweeney v. Auditor, 4 R., 837; Kentucky Statutes, sec., 257, 1706; Meyers v. Meyers, 89 Ky., 442; Phillips v. Acton, 12 Bush, 375.

N. R. & H. M. PECKINPAUGH, ATTORNEYS FOR APPELLEE.

More than three months after the death of decedent, his estate was, upon motion of the asylum, a creditor, referred to J. H. Weller, the public administrator of Jefferson county for settlement. The homestead of decedent was conveyed by his

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heirs to appellant, Holburn, March 19, 1900, and on March 20, 1900, this action was instituted. So that the said deed was made and delivered and this suit instituted within six months after the death of decedent.

We contend:

1. That the authorities cited by appellant do not support his contention that "the verdict of the jury at the inquest is binding upon the asylum until the pauper acquires fresh estate or unless he had property the existence of which was unknown to the asylum authorities."

2. "Decedent being entitled to homestead exemptions the property descended to his children in fee simple regardless of any debts, and consequently appellant can not be bound by any claim against the same," is so absurd that we are surprised that counsel for appellant should advance it with any sincerity.

The facts disclosed by the record, are, that decedent did not leave a widow, his wife having died before him, and that all his children were at date of his death over twenty-one years of age except Charles, who became of age a month or so after his father died, and we claim that under this state of facts all question of homestead exemption is eliminated; further that homestead was not pleaded in the lower court and was not an issue and can not now be interposed.

3. As to the question of notice we desire to say that the appointment of Weller as administrator was and is a matter of public record, and therefore notice to all the world—further appellant is presumed to know the laws of his State and he should have been familiar with section 2087, Kentucky Statutes, which was designed to protect the creditors of deceased persons from such frauds as this.

4. We contend that the taxes due the city of Louisville for the year 1900, and the claim of the Central Asylum for keeping deceased therein, are valid subsisting debts against his estate at the date of his death, and that under the laws of the State, the real estate of the decedent may be sold to pay such debts where the personal estate was insufficient as is shown in this case, and that the administrator is the proper one and has authority to institute an action therefor, and the fact that there was no personal estate belonging to deceased does not prevent such an action.

AUTHORITIES CITED.

Sweeney v. Auditor, 4 Rep., 837; Humber v. Asylum, 16 R., 755; Schroer v. Asylum, 24 R., 150; Kentucky Statutes, secs. 1706, 1707, 2087, 257, 3006, 3903 to 3906, 3984, 4849; Civil Code, sec. 428, 429; Courts' Admr. v. Courts, 6 R., 512.

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OPINION OF THE COURT BY JUDGE O'REAR—REVERSING. .

Lawrence Pfanmiller died intestate, an inmate of the Central Lunatic Asylum for the Insane of this State, on the 2d of December, 1899. He had been admitted under a verdict and judgment of the Jefferson circuit court (criminal division) May 4, 1897. At that time he had a family—his wife and one infant child. There were a number of children who were grown and had left home. Pfanmiller owned a small piece of real property in the city of Louisville, worth about \$700 or \$800. He had owned it for a number of years, and occupied it as a homestead. A short while before he was found to be a lunatic, he and his wife, because of their old age and infirmities, induced one of their married daughters to move into the house with them, and to assume its expense and care. The old folks were unable to provide for themselves, and were extremely poor. After Lawrence Pfanmiller was adjudged a lunatic and sent to the asylum, his wife continued to live at the home until her death, February 13, 1898. Something over three months after the death of Lawrence Pfanmiller appellee was appointed his administrator by the Jefferson county court upon the motion of the Central Lunatic Asylum for the Insane, and within a few days afterwards brought this suit against the heirs of Pfanmiller to subject the house and lot to the payment of the debts of the decedent. The only claim asserted or filed against his estate was one for \$515 by the Central Lunatic Asylum, being the charge at the rate of \$200 per annum for the board and support of Pfanmiller for the period during which he was confined there. Formal and somewhat elaborate preparation of the action was had in which the above claim was allowed, as a result of which the commissioner reported costs incurred in the action to the extent of \$261.55 \$150 of which was a fee to the administrator's attorney,

and \$25 to the administrator for his services. The court allowed \$100 only for attorney's fees, but allowed the remainder of the costs, and subjected the property to sale for the payment of the claim of the asylum and the costs above named.

The State has provided these charitable institutions at its expense for the care of those unfortunates whose mental condition requires them to be forcibly restrained. The system provides that those who are, or whose parents are, able financially to support them, must pay to the asylum the same charge for their keeping as is allowed by the State for the maintenance of pauper lunatics kept there. Section 256, Kentucky Statutes, reads as follows: "An insane person shall be held to be a pauper if unable to pay six months' board in advance, or, if married, be unable to pay said board besides providing for others naturally dependent; or, if a minor, the parent of said persons are unable to pay board besides supporting others naturally dependent on them. The court holding the inquest shall require the jury to return a finding on this subject, and this verdict shall be binding upon the superintendent." Lawrence Pfanmiller was admitted under this section as a pauper, and properly so. The jury had found and the judgment of the circuit court had adjudged, him to be a pauper. He was manifestly unable to pay the board besides providing for the others naturally dependent upon him, namely, his wife and minor child. Section 257 of Kentucky Statutes is: "Where patients, who have been or may be supported in either of said asylums, have or shall acquire estate which can be subjected to debt, the board of commissioners of such asylum, when reliably informed of the fact, is authorized and directed, in every such case, to sue for, in the

name of the asylum, and recover the amount of said patient's board, at the rate of two hundred dollars per year, or so much thereof as such estate will suffice to pay for the time they shall have been respectively kept and maintained therein, and not otherwise paid for, and by proper proceedings to subject their estates, respectively, to the payment thereof," etc. In this action it is claimed by the asylum, and by counsel for appellee, that under the section last above quoted the property of the decedent is liable for this claim. It is not contended that Pfanmiller had acquired this property after his commitment to the asylum. It is admitted that the property sought to be subjected was owned by Pfanmiller at the time of his commitment. The question, then, is, did Pfanmiller have an estate which could be subjected to debt? The court is of opinion, under the facts stated in this case that Pfanmiller was a housekeeper with a family, so as to entitle him to the benefit of the homestead exemption provided by the laws of this State; and that, notwithstanding the death of his wife, and of his enforced absence from his home by reason of his commitment to the asylum, he did not lose the character of homesteader, nor any of its rights. We therefore conclude that there was no period during the life of Lawrence Pfanmiller and since his commitment to the asylum when he owned any "estate that could be subjected to debt." It is true that our statute (section 1707) allows the homestead of a decedent to be sold, subject to the occupancy of his widow and infant children, if a sale is necessary to pay his debts. But, strictly speaking, the claim of the asylum is not a debt. It is true it is a charge provided by law against certain estate of the lunatic—not against him—to be enforced *in rem* in the contingency and manner only prescribed by the statute. *Central Lunatic Asylum v. Penick*, 102 Ky.,

533, 19 R., 1583, 44 S. W., 92; *Schroer v. Central Lunatic Asylum*, 113 Ky. (24 R., 150) 68 S. W., 150; *Central Lunatic Asylum v. Drane*, 113 Ky. (24 R., 176), 68 S. W., 149. The court declines to enlarge by the process of construction the terms of this statute, intended primarily as a regulation of the State's charitable purposes toward this class of unfortunates so as to make it include estates not clearly and specifically subject by its terms. If the Legislature should hereafter deem it wise and just to subject the homesteads of deceased pauper lunatics to the payment of the charge for their support while kept in the asylum, they will probably do so as explicitly as they have allowed all homesteads to be subjected to the payment of the debts contracted by the deceased himself—*i. e.*, after his death—subject to the right of occupancy by the widow and his infant children. Without noticing certain features of the improper charge embraced in this claim of the asylum, the court is of opinion that it should have been rejected in toto.

This brings us to the consideration of another feature of this suit; that is, the right of the administrator to maintain this action under the circumstances, and especially of the liability of decedent's real estate to the rather extraordinary bill of cost brought about by this suit. No one could have died with less of personal estate than Lawrence Pfanmiller had, for he had none. The record shows that he had not even a rag, nor was it supposed that he had. He had been admitted to the asylum as a pauper. It knew that fact, and had so entered it upon its books. It procured the appointment of the administrator, and doubtless apprised him of the condition of the decedent's estate so far as it had information. Nor is there a suggestion in the record, save as to the item of taxes, which we will notice presently, that the decedent owed anything besides the

Holburn v. Pfanmiller's Admr.

claim to the asylum. Indeed, there does not appear to have been the slightest necessity for an administrator to this estate. Under this state of facts appellant contends that the appointment of the administrator was void. In this we can not concur. Unless the statutes so require, and except in the case of nonresident decedents, the possession of an estate by the decedent is not a prerequisite to the jurisdiction for the appointment of an administrator. Section 93, Schouler on Executors and Administrators, and cases collated at page 762, 11 Am. & Eng. Ency. of Law (2d Ed.). Our statutes on this subject are as follows:

"Sec. 3894. When any person shall die intestate, that court shall have jurisdiction to grant administration on his estate that would have jurisdiction to probate his will had he made one."

"Sec. 4849. Wills shall be proved before, and admitted to record by the county court of the county of the testator's residence; if he had no known place of residence in this Commonwealth, and land is devised, then in the county where the land, or part thereof, lies; if no land is devised then in the county where he died, or that wherein his estate, or part thereof, shall be, or where there may be any debt or demand owing to him."

The decedent's place of residence in this Commonwealth was Jefferson county. Therefore, under these statutes, that court had jurisdiction to appoint an administrator. Jurisdiction to appoint an administrator, however, does not mean that an administrator is necessarily to be appointed in the case of every one who dies intestate. If the court deem it proper, or probably even if it have doubts about the propriety of the appointment, it should be made. The rights and duties of such administrator are another question. His right is to have the possession and custody of

the personal property of the decedent not exempt under the statute from distribution and sale, to collect the debts and demands due the decedent, to pay same to the creditors and distributees, and to represent his estate in litigations against it seeking to charge it with a personal liability. Under section 428 of the Civil Code of Practice "a representative, legatee, distributee or creditor of a deceased person may bring an action in equity for the settlement of his estate." If personal estate has come to the hands of the administrator which is insufficient to satisfy all of the debts of the decedent, and if there is real estate descended, the personal representative is authorized by this section to institute an action for the settlement of the estate, for he is interested therein. His own accounts, the priority of claimants to the funds in his hands for distribution, the extent of the pro rata that may be adjudged against the personal estate in favor of the creditors, are matters about which he is entitled to have the conclusive judgment of a court of competent jurisdiction for his own protection. For simplicity, and to avoid numerous suits, he is permitted to bring in the heirs at law and have the real estate subjected in so far as the personal property is insufficient to pay the debts. But where there is no personalty, where nothing has come or can come to the hands of the administrator (in this State he having neither right nor duty to take charge of the realty of the decedent, or rents accruing after his death), it is doubted if he should bring a suit for a settlement of the estate. The Code authorizes any creditor or distributee of a deceased person to bring such an action in their own behalf. In the case at bar there is no excuse for the intermeddling of an administrator. He has no accounts for settlement, no liabilities from which to be discharged, no interest to be

protected. The sole apparent purpose of such a litigation can be only either to aid at the extraordinary expense of the heirs at law some claimant in the litigation against the decedent's estate, or to get for the administrator or his council certain fees for their services. In the absence of some tangible personal estate, choses in action, or debts owing to the decedent, the administrator may properly refrain from bringing such an action; but if he should have doubts as to his duties in the premises, and as to the assets and liabilities of his intestate, the action will be brought subject to the relief finally granted; that is, if it should be finally adjudged that the decedent owed nothing, and there was nothing that came or could come to the hands of the personal representative for administration, the action should be dismissed, as to the defendants, with a judgment to them for their costs. If the administrator fails to make good the allegations of his petition, he should not be allowed to burden the heirs at law with an onerous bill of costs, but should be turned out of court upon the same terms as other unsuccessful litigants.

An effort was made to show that the decedent owed taxes to the city of Louisville when the suit was brought. The taxes had been assessed, it is true, on the 1st of September, but were not due until some time after this suit was brought. The city did not present a claim, and is not claiming in this action that decedent owed it anything for taxes or otherwise. The tax was against the real property, and a lien thereon, it is true, but it is not a debt; and, at any rate, there was no excuse for this premature suit to have the property subjected to its payment by a suit in chancery before there had been default by those legally chargeable therewith.

The judgment is reversed, and cause remanded, with directions to dismiss the petition, as well as the cross-petition of the Central Lunatic Asylum for the Insane.

Petition for rehearing by appellee overruled.

CASE 94—ACTION BY THEOPHILUS CONRAD AGAINST W. J. THOMAS AND OTHERS INVOLVING A CONSTRUCTION OF A LEASE.—FEB. 12.

Thomas and Others v. Conrad.

APPEAL FROM JEFFERSON CIRCUIT COURT, LAW AND EQUITY DIVISION.

JUDGMENT FOR PLAINTIFF AND DEFENDANTS APPEAL. REVERSED.

LANDLORD AND TENANT—REPAIRS—IMPLIED OBLIGATION—CONSTRUCTION OF LEASE—STATUTORY PROVISION—ACTION FOR RENT—REFORMATION OF CONTRACT—ASSIGNMENT OF LEASE—RIGHTS OF ASSIGNEE.

- Held: 1. A lease of a building provided that the lessees should keep the property in the same repair as on the completion of certain improvements, "natural wear and tear excepted," and to surrender them in as good condition as received, "natural wear and tear and natural decay, and injury or destruction" by any cause not their fault, excepted. HELD that, while the lease imposed no obligation on the lessee to repair injuries caused by natural wear and decay, it did not require the landlord to repair the roof, destroyed by natural wear and decay.
2. Kentucky Statutes, section 2297, provides that, unless the contrary be expressed in a lease, an agreement of a tenant to leave the premises in repair shall not bind the tenant to rebuild a building destroyed by casualty, nor shall the tenant be liable for the rent for the remainder of his term for a building destroyed by casualty without his fault. HELD, that no obligation was imposed on a landlord to restore a roof destroyed by wear and tear, and therefore a tenant could not set off against the rent the cost of replacing the roof, which was destroyed by natural decay.
3. There is no obligation, implied at common law, arising out of a contract of rent, that the landlord will pay the expense of a new roof, to replace one destroyed by natural wear and decay.

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4. Where, by mistake of the draftsman, a lease failed to contain the agreement of the parties that the lessor was to make repairs, and the lessees, on the refusal of the lessor to replace the roof, which had been destroyed by natural wear and decay, did so themselves, they were entitled, in an action for the rent, to ask for a reformation of the contract to express such agreement.
5. Where landlord asserts a claim under a lease against the assignees of the lessees, any claim that would have been available as a defense by the lessees, is available by the assignees.

HUMPHREY, BURNETT & HUMPHREY, FOR APPELLANTS.

This controversy involves the construction of a contract of lease executed by Conrad to Thomas and others, and by consent of the lessor assigned by the lessees to the Louisville Tobacco Warehouse Company, which lease provides that the lessees were to "make all repairs on the said property during the pendency of the lease, and to keep the property in good and substantial repair during the continuance thereof, as the same is in when certain improvements (named therein) are completed by the first party, *natural wear and tear* excepted." It further provided "that the lessees will take good care of said premises and suffer no waste to be committed or anything done to increase the insurance, and at the termination thereof the lessees will surrender peaceable possession of said premises, in as good order as when received by them in its completed condition (the improvements herein stipulated having been made by the first party as aforesaid) *natural wear and tear and natural decay* and injury or destruction by fire or other cause not the fault of the second parties, excepted."

It is alleged in the answer and not denied, that among other improvements placed on the premises by the landlord was a roof on the warehouse building. The lease by its terms was to run ten years from the fall of 1895.

It is alleged and not denied that at the end of five years, to-wit, in the fall of 1900, said roof on account of natural wear and tear and natural decay became so worn out and worthless as to endanger the tobacco and other property stored therein, that it was incapable of being repaired, and that a new roof was demanded for the needs of the warehouse, and that the landlord was notified thereof and requested to place a new roof thereon, which he refused to do, and thereupon the lessees were compelled to put on a new roof in order to protect themselves and their patrons, at a cost of \$842, which was a reasonable price for the work, which sum the lessees, appel-

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lants herein, claim to be entitled to deduct from their rent, and tendered and offered to pay the balance due.

The question therefore is, whether or not a fair and reasonable construction of the lease contract, contains an implied covenant on the part of the landlord to repair such parts of the leased premises as might become impaired by natural wear and tear and natural decay.

It is contended by appellee that in the absence of an express covenant on the part of the landlord to make good such impairment of the premises as might be caused by natural wear and tear and natural decay, the law implies no obligation on him whatever, and that the tenant must either make such repairs at his own cost or abandon the premises or endure the damages resulting from the impaired condition of the premises.

We do not believe that this court will put its stamp of approval upon any such proposition.

AUTHORITIES CITED.

Allen v. Fisher (New Jersey) 49 Atl. Rep., 477; Helburn v. Mofford, 7 Bush, 169.

WILLIAM KRIEGER & BURRELL K. MARSHALL, ATTORNEYS FOR APPELLEE.

POINTS AND AUTHORITIES.

1. Under the common law the tenant upon his covenant to pay rent is obliged to do so even though the premises are destroyed by inevitable casualty. Redding v. Hall, 1 Bibb, 539; Bohannon v. Lewis, 3 T. B. Mon., 380; Helburn v. Mofford, 7 Bush, 174; Taylor v. Landlord & Tenant, secs. 327, 328, 329 and 343; Am. & Eng. Ency. of Law, vol. 12, pp. 720, 721, 723.

2. The tenant has no authority, express or implied, to place a new roof on a building and charge the same to the landlord. Warner v. Wagner, 75 Ala., 188; Biddle v. Reed, 33 Ind., 529; Wabash, *et al.* v. Brett, 25 Ind., 409; Womack v. McQuarry, 28 Ind., 475; Smith v. Kinkaid, 1 Ill. Ap., 620; Hess v. Newcomer, 7 Md., 336; Kline v. Jacobs, 68 P. St., 59; Taylor v. Landlord & Tenant, secs. 358, 360, 361, 372 and 380.

3. When the tenant covenants to repair and return the premises at the expiration of the term in substantially as good condition as when received his failure to do so will make him liable on his covenant. Brashear v. Chandler, 6 T. B. Mon., 150; Proctor v. Keith, 12 B. Mon., 254; Moore v. Townsend, N. J. L., 284; Petz v. Voigt Brewing Co., 116 Mich., 418; Kreuger v. Ferrant, 29 Minn., 385; Warner v. Hitchins, 5 Bar. (N. Y.) 667; Munford v. Brown, 6 Cowen (N. Y.) 476; Amer. & Eng. Ency. of Law, vol. 12, pp. 720, 721, 723.

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4. Construction of section 2297 of general statutes of Kentucky. *Sun Insurance Office v. Varble*, 103 Ky., 758; *Suydam v. Jackson*, 54 N. Y., 454.

AUTHORITIES BY APPELLEE ON PETITION FOR RE-HEARING.

1. Assignee of lease has no privity of contract with lessor and only holds by privity of estate. *Taylor's Landlord and Tenant*, 8th ed., vol. 2, secs. 436, 438.

2. Taylor approved by Kentucky Court. *Myer Bros, Assignee v. Gaertner*, 21 Ky. Law Rep., pp. 53, 54, 56, 57.

3. "Privities in respect of contract are personal privities and extend only to the persons of the lessor and lessee." *Rapalje and Lawrence's Law Dictionary*, vol. 2, S. S. 4 under Privies.

4. When inconsistent pleas are allowed and how pleaded. *Ky. Civil Code*, sec. 113; S. S. 4.

5. Assignee can relieve himself of lease on all covenants by assigning over. *Muldoon v. Hite*, 6 Ky. Law Rep., 663; *Trabue v. McAdams*, 8 Bush, 78; *Taylor Landlord and Tenant*, vol. 2, sec. 452.

6. To correct for mistake in drawing the contract mistake must be mutual and be between the parties to the contract. *Reeder v. Lewis*, 7 Ky. Law Rep., 373; *Ky. Lumber Co. v. Mercantile F. & M. Ins. Co.*, 7 Ky. Law Rep., 832, 833; *Stockhoff v. Brannin*, 14 Ky. Law Rep., 717; *Overstreet v. Mouser*, 14 Ky. Law Rep., 480; *Porter v. Rowe*, 12 Ky. Law Rep., 139; *Tandy v. Hatcher*, 9 Ky. Law Rep., 151; *Hill v. Pettit*, 23 Ky. Law Rep., 2002.

OPINION OF THE COURT BY JUDGE PAYNTER—REVERSING.

The appellants, W. J. Thomas *et al.*, leased from the appellee, Conrad, a certain building situated at the corner of Tenth and Main streets, in the city of Louisville, for a period of ten years. The following facts appear: Conrad purchased the property for \$40,000, and agreed with lessees to remodel the building in a way particularly specified, at a cost of \$15,200; the work to be done under the supervision of the lessees. The lessees were to keep the property insured during the progress of the improvements, and thereafter during the term of the lease. As a rental for the property, the lessees agreed to pay the lessor an-

nually a sum equal to 7 per cent. per annum on the cost of the property and improvements, which rental was to be paid quarterly; and, in addition thereto, they were to pay all city, State and county taxes, all street improvements, and apportionment warrants assessed against the property by the city. Pursuant to the contract, the lessees took possession of the property, and for a period of five years they, or their assignee, discharged all of the obligations imposed by the lease. At the end of that period the roof, which had been placed upon the building as a part of the improvements, became so worthless, by natural wear and tear and natural decay, that it no longer served the purposes of a roof, and could not be repaired. The only thing that could be done to enable the parties to occupy the warehouse (the building was to be used as a tobacco warehouse) for the storage of tobacco, and the general purposes for which it was used, was to place a new roof upon it. The lessees requested the lessor to put it on, but he refused to do so. Thereupon the lessees did so, and withheld sufficient rent to reimburse them the expense. This action was instituted to recover the rent, and the appellants sought to plead the cost of the roof as an offset against it. The foregoing facts were averred in the answer, to which the court sustained a demurrer

The question here for consideration is as to the right of the lessees to place the new roof upon the building at the cost of the lessor. It is insisted that, as the lessor did not agree to repair the building during the period of the lease, or to restore such parts as might be destroyed by natural wear and tear and decay, he was under no obligation to do so, and the lessees could not do so and compel him to pay the expense.

There are two provisions of the lease bearing upon this question, which read as follows:

"And the second parties further agree and bind themselves, their heirs, executors, and assigns, to make all repairs on the said property during the pendency of the said lease, and to keep the said property in good and substantial repair during the continuance of said lease, as the same is in when the improvements are completed by the said first party, natural wear and tear excepted."

Fourth paragraph:

"At the terminaion of this lease as herein provided, the second parties will surrender peaceable possession of said premises in as good order as when received by them; in its completed condition, the improvement herein stipulated for having been made by the first party as aforesaid, natural wear and tear and natural decay, and injury or destruction by fire or other cause not the fault of the second parties, excepted."

At common law the covenant of the tenant to pay rent obligated him to do so, even though the premises were destroyed by inevitable casualty. *Redding v. Hall*, 1 Bibb, 539; *Bohannons v. Lewis*, 3 T. B. Mon., 380; *Helburn v. Mefford*, 7 Bush, 174. If a tenant, without any qualification, agrees to repair, and return the premises at the expiration of the term in substantially as good condition as when received, his violation of his covenant to do so will make him liable. *Brashear v. Chandler*, 6 T. B. Mon., 150; *Proctor v. Keith*, 12 B. Mon., 254. In *Brashear v. Chandler* the tenant agreed that he would deliver the farm to the landlord in "good, tenantable repair, in every respect." The court held that he was compelled to do so, although the premises were not in good repair when received. In *Proctor v. Keith* the tenant agreed "not to suffer any of

the fencing to rot down, and was to keep it in good repair, natural wear excepted." The fencing was washed away by a freshet, and the court held that the tenant's covenant imposed upon him the duty of rebuilding the fence. At that time section 2297, Kentucky Statutes was not in force. It reads as follows: "Unless the contrary be expressly provided for in the writing, no agreement of a lessee that he will repair, or leave the premises in repair, shall have the effect of binding him to erect similar buildings, if without his fault or neglect the same may be destroyed by fire or other casualty; nor shall a tenant, unless he otherwise contracts, be liable for the rent for the remainder of his term of any building leased by him, and destroyed during the term by fire or other casualty without his fault or neglect." Had the above statute been in force, the court would not have compelled the tenant to restore the fence. *Sun Insurance Office v. Varble*, 103 Ky., 758, 20 R., 556, 46 S. W., 486. In stating the foregoing conclusion, we have practically agreed with counsel for appellee and for appellants.

The lessees covenanted to keep the property in good and substantial repair during the continuance of the lease, as same was when the improvements were completed, "natural wear and tear excepted." They agreed to surrender the premises in as good order as when received by them, "natural wear and tear and natural decay, and injury or destruction by fire or other cause" not their fault, excepted. These stipulations certainly impose no obligation upon the lessees to make repairs upon the building rendered necessary by natural wear and tear and natural decay, or injury or destruction by fire or other cause. Against such liability there is an express stipulation. The parties contemplated that it should be occupied for ten years as a tobacco ware-

house, and that the rent should be paid during that period, unless the appellants were exonerated by their contract, or by the section of statutes quoted, or because of the failure of the lessor to keep an obligation imposed upon him by the terms of the contract. If the building had been damaged or destroyed by fire or other cause not the fault of the lessees, and the landlord refused to restore it, certainly the tenants could not be compelled to retain the building or premises and pay the rent. They were both exempted from this liability by reason of the statute and their covenants against it. It will be observed that there is no promise contained in the lease that in the event the property is destroyed by fire or other cause or if it should become untenable by reason of the natural wear, tear and decay the landlord will repair or rebuild, as the case might be. The lessees entered into the contract without providing against such a contingency. At common law, unless there was an express obligation to that effect, the landlord was not required to make repairs upon property during the term of the lease. He was entitled to collect his rent, even if the property was destroyed by fire or other casualty, although no obligation rested upon him to restore the property. The statute which we have quoted does not impose an obligation upon the landlord to repair or rebuild, but its purpose was to modify the rigor of the common law, and to relieve the tenant from the liability to rebuild under covenant that he would keep the premises in repair, and to relieve him from the payment of rent during the remainder of the term if the leased building was destroyed by fire or other casualty without his fault or neglect. So the common law prevails, except as modified by the statute.

The authorities do not support the claim of counsel for

appellants that there is an implied obligation arising from the contract, upon the landlord, to pay the expense of the roof. They are against such claim. In *Proctor v. Keith* it appeared that there was no covenant in the lease which required the landlord to make the repairs. The tenant was injured by the lessor's failure to restore a fence which had been washed away by a freshet. He claimed that the landlord had verbally promised to do so. The lease, however, did not contain such a stipulation. The court was called upon to consider the question of the alleged promise, and said: "The agreement did not contain any stipulation upon the part of the lessor to make repairs of any kind, nor does it contain any provision exempting the tenant from the payment of rent in consequence of the deterioration of the premises on account of unavoidable accident. No obligation was imposed upon the lessor either by law or by the terms of the original agreement of the parties, and there was no consideration for his promise, unless the lessee had a right to yield up and abandon the leased premises either because of the loss of the fences, or by the terms of the agreement itself." As the law did not impose the duty upon the lessor to restore the fence, the court looked for a covenant in the lease which would do so, but failed to find it, and hence held that the verbal promise was without consideration. If, under the terms of the lease under consideration, the lessor could be made to put the new roof on the building, he for the same reason could have been compelled to replace the building, had it been destroyed by fire or other casualty. The supposed implied obligation would have been as efficacious in the one case as in the other. If lessees desire to protect themselves against such contingency as has arisen in this case they must see that it is provided for in the contract.

The averments of the answer which tender the issue discussed were demurrable. But in addition to them it is averred that, if the contract can not be construed as imposing an obligation upon the lessor to make repairs, such provision was omitted by mistake of the draftsman, as there was an agreement to the effect that the lessor was to make the repairs in question, and it asked to have the contract reformed. These averments, if true, entitle the lessees to have the contract reformed in accordance with the agreement of the parties.

Judgment is reversed for proceedings consistent with this opinion.

June 3, 1903.

Response to petition by appellee for rehearing:

The assignees of the lessees acquired all rights in the contract of lease which they had, one of which is to have it enforced according to the terms in the same manner as the lessees could have done. The landlord is asserting a claim under the lease against the assignees of the lessees. Certainly, any claim which would have been available as a defense by the lessees is likewise available as a defense by their assignees. The same proceeding in the case that would have been necessary to have enabled the lessees to establish their defense is open to their assignees.

The petition for a rehearing was considered by a judge other than the one who delivered the opinion.

Mercer County v. City of Harrodsburg.

CASE 95—ACTION BY MERCER COUNTY AGAINST THE CITY OF HARRODSBURG FOR DAMAGES FOR REMOVING HITCHING RACKS ERECTED BY THE COUNTY IN SAID CITY.—FEB. 13.

Mercer County v. City of Harrodsburg.

APPEAL FROM MERCER CIRCUIT COURT.

JUDGMENT FOR DEFENDANT AND PLAINTIFF APPEALS. AFFIRMED.

CONTRACTS—MUNICIPAL CORPORATIONS—NUISANCE.

Held: 1. Where plaintiff, a county, contracted with defendant city that, in consideration of plaintiff's agreement to build a fence and a good brick pavement on certain land surrounding defendant's public square, and its surrender of such land, plaintiff should be granted the privilege of erecting hitching racks on the same, and be entitled to perpetually maintain the same, which it did for seventeen years without interruption, when, by reason of the growth of the city, the racks became a nuisance, and defendant forcibly removed them, plaintiff was not entitled to recover therefor.

W. C. BELL AND GAITHER & VANARSDALL, FOR APPELLANT.

The county surrendered the ground and the title was in the city from that time, there being sufficient memorandum of the contract in writing. At the time of the wrongs complained of the city had been in possession for seventeen years. The city granted the county the easement to erect and maintain hitching racks on the land thus surrendered. On May 19, 1900, the city forcibly tore away the racks and would not allow the county to rebuild. The city was in the possession, and, denying the right, the county could not enjoy the easement. The county having no right to forcibly enter and enjoy the easement, the proper remedy was a suit to recover damages.

The city induced the county to enter into a contract that was lawful in all its parts; by reason of the city increasing its population the use of the easement granted becomes a nuisance, hence, if the city forcibly removes the racks and refuses to allow the use of the easement, then it must pay in damages the value of the lands and improvements. *

Mercer County v. City of Harrodsburg.

AUTHORITIES CITED.

Mercer County v. City of Harrodsburg 23 R., 1744; Steele v. Curle, 4 Dana, 384; Gray v. Ayres, 7 Dana, 376; Harrison County v. Wall., 11 R., 223.

ROBERT HARDING, ATTORNEY FOR APPELLEE.

The lower court properly sustained a demurrer to the petition and dismissed same.

We contend:

1. That the court of claims of Mercer county had no power or authority to establish public hitching posts for the convenience of the public, and that the agreement or contract with appellant is void and there can be no violation of a void contract.

2. The seven trustees whose names appear to be signed to this written contract had no power to make a contract by which the streets of Harrodsburg should be converted into a place where horses and vehicles should stand, thereby obstructing public travel thereon, and creating a public nuisance.

3. The allegations of the petition that the city by injunction proceedings in the Mercer circuit court has prevented appellant from replacing these posts and chains, and by ordinance duly passed forbidding persons from hitching horses upon the court house square under a penalty of five dollars for violation of same, make it apparent that the petition does not state a cause of action.

AUTHORITIES CITED.

Wortham v. Grayson County, 13 Bush, 57; Downing v. Mason County, 87 Ky., 212; Mercer County v. City of Harrodsburg, 23 R., 1744.

OPINION OF THE COURT BY JUDGE NUNN—AFFIRMING.

On October 3, 1883, the appellant and appellee made a contract by the terms of which the appellant surrendered to appellee seven feet of ground on the north side of its public square in Harrodsburg, and a like amount on the south side, both strips extending the width of the square from east to west; and appellant agreed to build a fence on the new line, and a good brick pavement on the land surrendered, for which land and the improvements made the appellee granted to the appellant the right and priv-

ilege to erect hitching racks on the old line, and to perpetually maintain them. Appellant's petition sets up this contract, and that in keeping with it the county surrendered the lands, which were of the value of \$2,500, and made the improvements at a cost of \$700, to recover which this action was brought, after which it erected the hitching racks, and maintained them as contemplated by the contract until May 19, 1900, when appellee forcibly tore down the racks, removed them, and then denied the right and privilege of appellant to erect and maintain the racks. The petition fails to state that the racks were torn down without right, but says that they were prohibited from re-erecting the racks "by injunction proceedings in this honorable court;" and, further, that the city, by an ordinance duly passed, and entered on its records, had prevented all persons from hitching horses on the courthouse square under a penalty of \$5 for each violation. To the plaintiff's petition appellee filed a demurrer, which the lower court sustained, and this cause is here on appeal from that judgment.

From the petition it seems clear that this contract was valid and binding upon the parties when made, and each party continued to receive the benefits of the consideration from the date thereof until the year 1900, a period of seventeen years. This court also gathers from the petition that in 1900 the use of the racks became a nuisance, and that they were necessarily removed. A hitching rack is not *per se* a nuisance, and this court has so held in the case of Harrison County v. Wall, 11 R., 223, 12 S. W., 130. And also in the case between the same parties to this action, 23 R., 1744 (66 S. W., 110, 56 L. R. A., 583). In the last case referred to the court said: "While the hitching posts and chains were not a nuisance in

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themselves, they became a nuisance from the hitching of horses to them. They were placed there for horses to be hitched to them, and the removal of the posts and chains was the only way to abate the nuisance." And again, the court said: "The city was not estopped by the contract made in the year 1883. As population increases, things become nuisances which occasioned little inconvenience when the population was not so dense, or the traffic so great. The contract of 1883 did not contemplate the creation of a nuisance. The town trustees could not have legalized a nuisance if they had contemplated it." At the time this contract was entered into in 1883, and appellant accepted the hitching posts as the consideration for the strips of land, it so accepted same with the knowledge that it might, on account of the growth of the city and the county, and the great and continued use of the same, become a nuisance, and therefore be compelled to surrender same for the public good and health. And it appears from the petition that this occurred in 1900. Appellant received a good and valuable consideration, and had the benefit of it for seventeen years, but owned and used it all the time subject to the public welfare; and the appellee did not, by any act or omission, cause it to become a nuisance, but it was caused by the natural and to be expected growth of the city and the county, and the great use to which it was put by reason thereof. In 1 Bush, p. 143, 89 Am. Dec., 616 (Ashbrook v. Commonwealth), these principles are enunciated: "The pursuit of a noxious trade is lawful so long as it does not interfere with the rights of the public; but when it does so interfere with these superior rights it becomes illegal, and no length of time can sanctify it, as its exercise is a daily renewal of the offense. Whilst many private rights will be protected from public invas-

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ion because not necessary to the public good, yet most of the individual rights are held subordinate to the public welfare." The appellant entered into this contract with the knowledge that the hitching rack might become a nuisance. The contract was fairly made, and appellant took upon itself the risk of its becoming and being declared a nuisance; and, whatever may be the apparent hardship of losing the use and benefit of its consideration, it was brought about by its own voluntary undertaking, and it is therefore entitled to no relief. To this effect is *Griswold v. Taylor's Administrator*, 1 Metc., 231.

For these reasons the judgment of the lower court is affirmed.

CASE 96—ACTION BY BEATRICE MOAYON AGAINST HER HUSBAND, MAX MOAYON, TO ENFORCE A CONTRACT MADE BY THEM TO AVOID A SEPARATION.—FEB. 13.

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APPEAL FROM CHRISTIAN CIRCUIT COURT.

JUDGMENT FOR DEFENDANT AND PLAINTIFF APPEALS. REVERSED.

HUSBAND AND WIFE—CONTRACT—CONSIDERATION—SPECIFIC PERFORMANCE—MUTUALITY OF REMEDY—STATUTE OF FRAUDS.

- Held: 1. Where husband and wife are living apart because of grounds of divorce which she has, and on which she has had prepared a petition for divorce, her forgiving him and resumption of her relation of wife is sufficient consideration for his agreement to convey property for their children.
2. It is no defense against specific performance of an agreement for sale of an undivided interest in property that it may subsequently be sold to an undesirable person.
3. Where, in consideration of the mutual agreement of husband and wife, living apart because of her ground for divorce, to live

114	855
119	194
114	855
133	578
6133	579

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- with each other as husband and wife, he agrees to make a conveyance of property, and prior to the conveyance they resume their living together, it is no defense to specific performance of his agreement to convey that there is lack of mutuality of remedy, whereby he may compel her always to live with him.
4. A contract to convey a third of all one's estate, of whatever nature, acquired by him under his mother's will, or otherwise acquired and now owned by him, sufficiently describes the property, as it may be identified by parol evidence, to satisfy the statute of frauds.
 5. A contract between husband and wife, by which he agrees to convey property, being just and reasonable, and such as would be good at law if made by him with a trustee for her, will be enforced in equity.

HUNTER, WOOD & SON, KOHN, BAIRD & SPINDLE AND BARKER & WOODS, ATTORNEYS FOR APPELLANTS.

This case is appealed from a judgment of the Christian circuit court dismissing on demurrer the petition of the appellants (plaintiffs below).

Only propositions of law are involved. They are interesting, and, though novel in this State are well established by the decisions of other States. The questions involved may be generally stated thus:

1. If a wife, having reasonable grounds for believing she has good cause for a divorce, separates from her husband, and, while living apart, in consideration of his promise to treat her according to the full measure of his marital obligations, and his agreement to convey one-third of his property to a trustee for the benefit of their children, condones his wrongs and returns to his home and makes him a dutiful wife, and he then refuses to make the transfer and conveyance of the property,—a court of equity will decree a specific performance of the contract by compelling him to make the necessary conveyances.

2. The general rule that a contract, to be specifically enforced in equity, must be mutual in its obligation and remedy does not apply where the contract has been fully executed by one party, and all that remains for full execution is performance by the other party.

In conclusion we can only add that appellee stands in this court without one redeeming feature to his position. He has accepted the benefits of an agreement with his wife and now refuses to comply with his part of the contract; he interposes no defense that rises above a technical quibble as to the possible effect of the agreement which was signed at the time he and his

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wife entered into the agreement whereby she became reconciled and returned to his home. Although he has been guilty of an actual fraud on his wife and children, he attempts to justify his present position by some of his own shortcomings. There is not one equitable claim in the stand he takes.

On the other hand, appellant comes into this court with clean hands. She has performed her part of the contract sought by the appellee, and having fully performed, and having been deceived by the appellee, she appeals to this court in behalf of herself and her infant children to compel the appellee to fulfill, at the behest of the court, the promise so solemnly made and so faithlessly broken.

Upon the whole case, we therefore submit to the court that none of the objections made to the specific enforcement of this contract is well taken. We submit:

1. That the contract is founded upon a valuable consideration, and that its making and its enforcement are favored upon principles of public policy.

2. That the contract is definite and certain, fair and reasonable, and that if there be any equitable reason against its enforcement such is not apparent upon the contract itself or upon the face of the petition, and must be presented by answer.

3. That the contract is not open to any defense of a lack of mutuality or obligation or remedy on the part of the wife, because she has performed.

4. That the description of the property to be conveyed is sufficiently certain and sufficiently identified to satisfy the statute of frauds, and that extraneous evidence will only be necessary to apply the description, a necessary incident of all contracts and conveyances.

5. That a wife is not precluded by the laws of this State from entering into an enforceable agreement settling the property rights between herself and her husband.

AUTHORITIES CITED.

1. The consideration executed by appellant is a valuable one and sufficient to sustain an action for specific performance, and even were it only meritorious it would be sufficient under the Kentucky decisions. *Gaines v. Poor*, 3 Met., 503; *Flood v. Flood*, 5 Bush, 170; *Loud v. Loud*, 4 Bush, 455; *Evans v. Evans*, 93 Ky., 510; *Bishop's Marriage, Divorce and Separation*, sec. 1279; *Adams v. Adams*, 91 N. Y., 381; *Phillips v. Meyers*, 82 Ill., 70; *Barbour v. Barbour*, 49 N. J. Eq. Rep., 429; *Nelson on Divorce and Separation*, vol. 1, sec. 507; *Rathmeier v. Beckwith*, 35 Mich., 110; *Reamey v. Bailey*, 11 Atl. Rep., 439; *Colame v. Same*, 26

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N. J. Eq., 551; *Butler v. Butler*, 42 Atl., 755; *Footes v. Nickerson*, 53 Cen. Law Journ., 146; *Hart v. Hart*, L. R., 18 Ch. Div., 670; *Stanes v. Stanes*, L. R., 3 P. D., 42; *Smith v. Smith*, 35 Hun., 378; *Phillips v. Thompson*, 1 Johns. Ch. (N. Y.) 131-149; *Wakeman v. Dodd*, 27 N. J. Eq., 564; *Sheperd v. Sheperd*, 7 Johns. Ch. (N. Y.) 57; *Casto v. Fry*, 33 W. Va., 449; *Parsons on Contracts*, vol. 3, p. 314; *Stedman v. Guthrie*, 4 Met., 146; *Talbott v. Stemmon's Exor.*, 89 Ky., 222; *Allen v. Pryor*, 3 A. K. Marshall, 305; *Lancaster v. Burkhart*, 2 Bibb, 30; *Sanders v. Miller*, 79 Ky., 520; *Cotton v. Graham*, 84 Ky., 672; *McIntyre v. Hughes*, 4 Bibb, 187; *Stovall v. Barnett*, 4 Litt., 207; *Ford v. Ellingwood*, 3 Met., 359; *Arnold v. Park*, 8 Bush, 3.

2. The doctrine that there must be mutuality of obligation and remedy for the specific enforcement of a contract does not apply where the party seeking enforcement has performed. *Pomeroy's Eq. Jurisprudence* (2d ed.) secs. 1405, 932, 1407, 1409; *Green v. Richards*, 23 N. J. Eq., 32, 35; *Woodruff v. Woodruff*, 44 N. J. Eq., 349; *Wilkes v. Railroad*, 79 Ala., 180; *Welch v. Whelply*, 62 Mich., 15; 4 Am. St. Rep., 810; Am. & Eng. Ency. of Law (1st ed.) vol. 22, pp. 1020-1022; *Warvelle on Vendors* (2d ed.) vol. 2, sec. 739; *Simon v. Wildt*, 84 Ky., 157; *Fry on Specific Performance*, 207; *Logan National Bank v. Townsend*, 8 R., 694; *Boucher v. Van Buskirk*, 2 Marshall, 724.

3. The contract here sought to be enforced is reasonable and fair both in law and in facts. *Gooding v. Gooding*, 20 Rep., 955; *Irwin v. Irwin*, Id., 1761.

4. The contract sufficiently described the property to be conveyed. *White v. Herman*, 51 Ill., 243; *Gerrish v. Towne*, 3 Gray (Mass.), 82; *Nichols v. Johnson*, 10 Conn., 199; 25 Pac. Rep., 728; 3 *Starkey on Evidence*, 1621; *Johnson v. Ronalds*, 4 Munf., 77; *Jackson v. Sill*, 11 Johns. Rep., 201; *Doolittle v. Blackislee*, 4 Day, 265; *Barry v. Coombie*, 1 Peters, 640; *Hurley v. Brown*, 98 Mass., 545; 22 Am. and Eng. Ency. of Law (1st ed.), 965; *Ragsdale v. Metz*, 65 Tex., 255; *Warvelle on Vendors*, vol. 1, secs. 96, 135; *Holcombe v. Hays*, 23 Rep., 352.

5. This action is not subject to any want of capacity in the appellants to sue. *Evans v. Evans*, 93 Ky., 510; *Loud v. Loud*, 4 Bush, 453; *Bohannon, &c. v. Travis*, 94 Ky., 59; *Story's Eq. Jurisprudence*, sec. 1372; *Maraman v. Maraman*, 4 Met., 84; *Livingston v. Livingston*, 2 Johns. Ch., 537; *Ward v. Crotty*, 4 Met., 59; *Garlick v. Strong*, 3 Paige, 440; *Marshall v. Hutchinson*, 5 B. Mon., 298; *McCann v. Letcher*, 8 B. Mon., 320; *Athurly on Marriage Settlements*, 161; 2 *Kent's Com.*, 166; *Barron v. Barron*, 24 Vermont, 398; *Sanders v. Miller*, 79 Ky., 520; *Kalfus*

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v. Kalfus, 92 Ky., 542; Leahy v. Leahy, 97 Ky., 59; Campbell, &c. v. Galbreath, 12 Bush, 459; Kentucky Statutes, sec. 2128; Civil Code, sec. 34.

JOHN C. DUFFY, FOR APPELLEE.

PROPOSITIONS RELIED ON FOR APPELLEE.

1. A married woman could not sue her husband at common law and that disability has not been removed by statute in Kentucky. Matson v. Matson, 4 Met., 262; Williamson v. Yeager, 13 R., 273; 14 R., 548; Bohannon v. Same, 14 R., 912; Kalfus v. Same, 92 Ky., 542; Leahy v. Same, 17 R., 187.

Effect of Weissinger act:

2. Specific performance will not be enforced when contract is wanting in definiteness, certainty or mutuality. Jones v. Noble, 3 Bush, 694; 2 Marshall, 345; Allen v. Roberts, 2 Bibb, 98; Burton v. Shotwell, 13 Bush, 282; 100 Ind., 482; 28 Am. Rep., 550; 124 Ill., 441.

3. A contract to create a trust being executory and incomplete, without a valuable consideration, can not be enforced. Story's Equity Jurisprudence, vol. 1, sec. 433; Pomeroy, vol. 2, secs. 997-1000; Beach on Trustees, Ch. 7; Clark v. Lott, 11 Ill., 105; Badgeley v. Botfend, 68 Ill., 25; 14 R., 811; 19 R., 37.

LANDES & ALLENSWORTH, FOR APPELLEE.

POINTS AND AUTHORITIES.

1. The agreement, the specific enforcement of which in this case is sought, does not possess those essential elements and incidents which must exist in a contract before a court of equity will decree its enforcement *in specie*. (1) It is not *reasonable* or *practicable*. (2) It is not supported by a *valuable* and *adequate*, or even a "*meritorious*" *consideration*. (3) It is not *mutual* either in its *obligation*, or in the *remedy* for its enforcement, and (4). It is not *certain* and *definite* in regard to the property to be conveyed, and it would require parol testimony to identify it.

2. The following authorities show what is the established doctrine with reference to contracts and agreements, the specific execution of which is sought to be enforced in equity, that they must possess the elements and incidents indicated, viz.: 3 Pomeroy's Eq. Jur., (ed. 1887), secs. 1404, 1405; Woollums v. Horseley, 93 Ky. Rep., 582; Simon v. Wildt, &c., 84 Ky. Rep., 157; Butt v. Bondurant, 7 Mon., 423; Petty v. Roberts, 7 Bush, 419; Bright's Exr. v. Bright, 8 B. Mon., 197; Allen v. Roberts, 2 Bibb, 98; Jones v. Noble, 3 Bush, 697; McIntyre v. Hughes, 4 Bibb, 187; Stovall v. Barnett's Exrs, 4 Littell, 207; Buford's Heirs v. McKee, 1 Dana, 107; Ford v. Ellingwood, 3

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Met., 359; Arnold v. Park, 8 Bush, 3; Cotton, Trustee, v. Graham, &c., 84 Ky. Rep., 672; Northup v. Ward, 12 Ky. Law Rep., 735; Northup v. Standifer, 15 Id., 740; Ray v. Talbott, 23 Ky. Law Rep., 572, decided June 7, 1901; Tyler v. Onzts, 93 Ky. Rep., 331; Jones v. Tye, Ibid., 390.

OPINION OF THE COURT BY JUDGE O'REAR—REVERSING.

Appellant Birdie Moayon and appellee, Max Moayon, are husband and wife. They have two children, who are infants. The Fidelity Trust & Safety Vault Company is the guardian of these children. Prior to December 4, 1900, there was a separation of these parties on a ground, as is alleged, which entitled the wife to a divorce *a vinculo*. It is not material to this decision as to the nature of this cause. The wife had retained counsel, who had prepared for filing a petition for divorce from appellee. On the 4th of December, 1900, at the instance of appellee, the parties treated for a settlement of their differences, resulting in a contract in writing between them, which we copy in full, as follows:

"This agreement, made and entered into this fourth day of December, 1900, by and between Max J. Moayon and his wife, Birdie Moayon, and the Fidelity Trust & Safety Vault Company, trustee for Beatrice and Jessamine, children of the said Max and Birdie Moayon, witnesseth: That whereas, the said Max and Birdie are now, and have been for some months past, living separate and apart from each other; and whereas, the said parties have this day agreed mutually to forego their differences, and to be reconciled, and live with each other as husband and wife, after the full execution of this agreement. Now, and in view of the fact that the parties have agreed that a settlement is to be made upon the said children by the said Max Moayon, in order to insure a sufficient estate for them and for their maintenance, education, and support, and the

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future welfare, now in consideration of the love and affection which the said Max Moayon bears the said children, Beatrice and Jessamine, and in consideration of one dollar in cash in hand paid, the receipt of which is hereby acknowledged, and in consideration of the acceptance of the trust by said Fidelity Trust & Safety Vault Company under this agreement, the said Max Moayon hereby agrees to convey, transfer, and deliver in fee simple to the Fidelity Trust & Safety Vault Company, as trustee, for the use and benefit of the said Beatrice and Jessamine Moayon, his children, one-third of all of his estate, real, personal, or mixed, of whatever kind or nature, belonging to him in his own right, which he acquired under the will of Hannah Moayon, his mother, as well as all the other estate otherwise acquired or now owned by him; the said personal property to be delivered according to the rules of law, and the real estate to be conveyed by deed properly acknowledged and recorded as soon as the deeds can be prepared. The absolute estate is to be conveyed to said trustee for the use and benefit of the said children, and in the event of the death of either of said children the estate of such child shall go to and belong to said Birdie Moayon, for her own sole and separate use forever. Said trustee shall have the authority to collect all income from said estate so conveyed, and pay the same over to the said Birdie Moayon for the use and benefit of the said children's care and education. She shall not be required to render any account of the moneys thus received by her, but her receipt shall be an absolute acquittance of the trustee. Said trustee shall be authorized to convey, sell, exchange, or dispose of any part of the estate so conveyed, and transfer a fee simple title, whenever the said trustee deems it proper to do so, and conveyance by the said

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trustee shall convey the fee simple title, and the said trustee shall hold the proceeds received from any such conveyance for the same use, purposes, and to the same extent and in the same manner as the original estate is held under this agreement. It is agreed between the parties that within ten days a full inventory of all the estate of the said Moayon shall be delivered to the said Birdie Moayon and said Fidelity Trust & Safety Vault Company, and the deeds executed in accordance with this agreement, and the transfers of personalty made in accordance with the terms of this agreement and to carry into full effect the same. Witness the hands of the parties this 4th day of December, 1900, at Louisville, Kentucky. Max J. Moayon. Birdie Meyers Moayon.

"The Fidelity Trust & Safety Vault Company joins in the foregoing arrangement for the purpose of signifying its acceptance of the trust to be created by the deed of conveyance contemplated by its terms. Fidelity Trust & Safety Vault Company, by John W. Barr, Vice President."

The foregoing facts are gathered from appellant's petition filed in this case seeking a specific performance of the above contract, it being also alleged that in pursuance thereto appellant Birdie had forgiven the wrongs of appellee, and had returned to his home, and resumed her relations as a dutiful wife; and from the date of this contract, and in performance of her part thereof, had continued to live with appellee as his wife, and was yet doing so. It was also averred that appellee had wholly failed to comply with his part of the agreement, the one above copied, and that he refused to do so. A full description of his property, alleged to be that intended by the parties to be and that was embraced in the terms of the written contract, was given in the petition. It shows a number

of pieces of real estate in Christian county, this State, and personal property of the value of about \$20,000. Appellee interposed a demurrer to the petition, which was sustained, and the petition dismissed.

In support of the judgment it is argued that the contract is unenforceable for the following reasons: (1) That it is not founded upon a valuable consideration, and that it is disfavored upon principles of sound public policy; (2) that it is indefinite and uncertain, and inequitable and unreasonable; (3) that it is lacking in mutuality of obligation and remedy on the part of the wife; (4) that the description of the property to be conveyed is not sufficiently certain, nor is it sufficiently identified to satisfy the statute of frauds; (5) that the wife can not contract with her husband concerning her property rights, nor can she sue him therefor, other than in an action for divorce and alimony. As a determination for appellee of any one of the questions just outlined must result in an affirmance of the judgment, we will take them up and discuss and dispose of them in the order stated.

1. It is conceded by the demurrer that Mrs. Moayon had legal grounds for her separation and divorce; that she and her husband were then living apart because of those grounds; and that she had retained counsel to prepare, and he had prepared, a suit for her seeking a divorce from her husband. She, at her husband's solicitation, forgave his wrong, resumed a relation which he, by his conduct, had forfeited, and had no legal right to longer claim, and saved to him the costs of the threatened litigation. Also, under the facts admitted, she was certainly entitled to recover from him substantial alimony, including maintenance for herself and children pending the action, and including a sum sufficient to enable her to employ counsel and de-

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fray the costs of her suit against him. As between other persons, where one has a cause of action against the other, and is about to begin a suit on it, its abandonment and satisfaction will constitute a consideration to support a contract based upon that fact. *Clarke v. McFarland's Exrs*, 5 Dana, 48; *Brown v. Buford*, 3 B. Mon., 508, 39 Am. Dec., 477; 6 Am. & Eng. Ency. of Law (2d Ed.) 947, and cases. Nor is it even necessary that the party sought to be charged shall have been benefited by the abandonment of the suit. If the other party has thereby been put to an irretrievably disadvantage, that fact will equally constitute what is termed a valuable consideration. *Ford v. Crenshaw*, 1 Litt., 70; *Gaines v. Scott*, 3 Ky., Law Rep., 418. Becoming reconciled to the husband, with full knowledge of his actionable offense, will be a bar, as a condonement, to the suit of the wife for divorce, based upon the original facts. Independent of the question whether the fact of the reconciliation was not of as much value to the wife as to the husband, and that a mere claim or right to a divorce is of no legal value, yet her right to a settlement upon herself and children as alimony and maintenance was a right possessing money value. When she abandoned and obliterated her cause for divorce in this case, it likewise nullified her right to sue for and recover alimony.

It is argued, though, that it is the duty of the wife, no less than of the husband, to maintain in good faith the marital relation; that a promise of one to pay money to the other to continue the married relation is at best but an agreement to pay for the performance of a duty already undertaken for a sufficient consideration (to-wit, the mutual undertaking to live together in the married state); and that, therefore there is nothing upon which to rest

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the new promise. Were it the fact that there was no cause for the separation, this argument of appellee would be good. The other side of this proposition—that is, an agreement between husband and wife by which the former undertook to pay the latter a stipend in consideration of their living apart—has been before this court frequently. In all those cases it was shown that the marital relations had become unendurable to the parties, whether because of statutory grounds of divorce or not was not always shown. The contract of the husband to pay the wife a stipulated sum, or to convey to her certain property, was upheld on the theory that it was the legal and moral duty of the husband to support the wife, and that these contracts were but another form of, and were in lieu of, the original undertaking, and were consequently valid. *Gaines' Admx. v. Poor*, 3 Met., 303, 79 Am. Dec., 559; *Flood v. Flood*, 5 Bush, 170; *Loud v. Loud*, 4 Bush, 455; *Evans v. Evans*, 93 Ky., 510, (14 R., 628) (20 S. W., 605). Nor was it held in those cases to be necessary that the suit for divorce should be pending in order to support the agreement. It was sufficient if there was an actual or impending separation and suit for divorce. *Gaines' Admx. v. Poor*, *supra*. It is the policy of the law, because it has been found best for social happiness and progress, that the state of marriage be encouraged. Certainly, if an agreement between husband and wife, settling the obligations of the husband to provide for the wife, in contemplation of their living permanently apart, will be specifically enforced, as being based upon a sufficient legal consideration, and as being not contrary to the policy of the law, *a fortiori* must be a contract between them under like conditions founded on the consideration of the restoration or preservation of the marital relation. See Bishop on Mar-

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riage, Divorce and Separation, section 1279. As said in *Adams v. Adams*, 91 N. Y., 381, 43 Am. Rep., 675: "While the law favors the settlement of controversies between all other persons, it would be a curious policy which would forbid husband and wife to compromise their differences, or preclude either from foregoing a wrong committed by the other." To same effect is the case of *Phillips v. Meyers*, 82 Ill., 70, 25 Am. Rep., 295. In *Barbour v. Barbour*, 49 N. J. Eq., 429, 24 Atl., 227, the wife had abandoned her husband because of certain violations by him of the marital duties. She brought suit for divorce and alimony. He sought a reconciliation. Among other inducements offered by the husband was the agreement to convey her certain real estate owned by him if she would be reconciled to him. Relying upon his assurances and promises, she did become reconciled, and again took up her former relations with him as wife. He then refused to comply with his agreement to convey her the property as he had agreed. The court, at her suit for specific performance, granted the relief prayed for. In the course of the opinion it was said: "The agreement is an agreement respecting the conveyance of land. The consideration was a valuable one. No consideration can be named of higher importance or of more solemn significance. It is difficult to measure it. Dollars and cents afford no adequate conception of the true nature of the consideration moving upon the one side to the execution of this agreement. This agreement is thus brought within every case that recognizes the doctrine of part performance in the slightest degree. Upon the part of the wife it is not only partially, but entirely, performed. She not only agreed to become reconciled to him, but in the sincerest manner, by her conduct, manifested her determination so to continue." In

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addition to the foregoing, we think the principle is also sustained by the following authorities: *Smith v. Smith*, 35 Hun., 378; *Shepard v. Shepard*, 7 Johns. Ch., 57, 11 Am. Dec., 396; *Casto v. Fry*, 33 W. Va., 449, 10 S. E., 799. We are consequently of opinion that the contract was based upon sufficient consideration, and is not opposed to a sound public policy.

2. That the contract is definite, certain, fair, and equitable, we have no doubt. The wife agrees to abandon, and it is alleged has abandoned, her suit for divorce, and has forgiven its cause. She agrees to resume the wifely relation, and has done so in pursuance to the agreement. The husband undertook, besides his promise of a fulfillment of the conjugal duties, to convey to a named trustee one-third of all his property for the maintenance and education of their two children; it in event of their death to go to the wife. It also was provided for the management of the trust. The only serious criticism of the paper as to its indefiniteness or lack of equity, besides the matters of description and mutuality, which will be discussed further on, is the suggestion that it is unfair and inequitable to appellee to enforce a contract that may let into joint ownership with him in his property, and in his mercantile establishment, other persons probably not desirable, and whose interference would jeopardize if not destroy the value of his business. As to the real property, it not infrequently happens that it is owned jointly by persons of incompatible tastes. Yet we have never before heard it urged as a defense against the specific performance of one's contract to sell an undivided interest in his land that his vendee might sell the interest to some undesirable person entailing probably a disastrous suit to

sell the whole property because of its indivisibility. Those are questions that might properly influence one in determining whether he will sell an undivided interest in his property. But, after he has contracted to do so for an adequate consideration, we perceive no reason why equity should relieve him from a specific execution of his contract on such a ground. Upon the face of the contract, it does not appear to us to be unfair. It settles upon the wife's children certainly no more than the allegations of her petition show would probably have been set apart to her as alimony, had she prosecuted her suit. That she saw proper to have this sum settled on her children, instead of upon herself, is not a ground for objection by appellee.

3. It is very earnestly argued that the contract should not be enforced because of lack of mutuality in obligation and in remedy. It is asserted by appellee that, before a contract will be specifically enforced in equity, it must not only be reasonable and practicable, and supported by an adequate consideration, and be certain and definite in regard to the property to be conveyed, but it must be mutually binding upon the parties, and the remedy for its enforcement must also be mutual to the parties. It is the latter condition that we now address ourselves to. We concede the correctness of appellee's proposition. Yet it may be satisfied with less than an ideal fulfillment of its full text. For example, it is generally held that, under the statutes of frauds and perjuries, where the contract is not in writing, if one party, relying on the agreement, and induced thereby, has executed his part of the contract, the other party may be compelled to perform, or to respond in damages if specific performance is withheld. Not to do so would be to make the statute enacted to prevent frauds an instrument for effectuating a fraud.

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To examine minutely that part of the agreement bearing on this question, we again quote from it: "Whereas, the said Max and Birdie Moayon are now, and have been for some months past, living separate and apart from each other; and whereas, the said parties have this day mutually agreed to forego their differences, and to be reconciled and live with each other as husband and wife after the full execution of this agreement: Now, in view of the fact that the parties have agreed that a settlement is to be made upon the said children by the said Max Moayon, in order to insure a sufficient estate for them, and for their maintenance, education, and support and future welfare: Now, in consideration of the love and affection which the said Max Moayon bears the said children, Beatrice and Jessamine, and in consideration of one dollar cash in hand paid," etc. We have not rested this contract on the consideration of the "love and affection" of the father to his children (though it seems that might alone have been sufficient in this State), any more than upon the one dollar recited as having been paid. In the case of an executed contract, reciting several matters as constituting the consideration, if any one of them is sufficient, probably that would satisfy the inquiry. But in an executory contract, the execution of which is resisted by one of the parties, the inquiry should embrace all the matters recited as the consideration, because we can not say that the complaining party would have entered into the contract in the absence of any of the matters recited as the moving consideration for his action. The consideration of this contract may be thus stated: (a) The mutual agreement to forego differences; (b) the mutual agreement to be reconciled; (c) the mutual agreement to live with each other as husband and wife; (d)

love and affection of the husband for his children; (e) \$1. The last two are not questioned. Appellant Mrs. Moayon did forego the cause of their difference. That part of the contract is unquestionably executed. She did become reconciled to appellee. That is executed. The only remaining part of the contract is (c) "the mutual agreement to live with each other as husband and wife after the full execution of this agreement." The parties saw proper to anticipate the time of execution of this clause of the contract, and resumed their living together before the full execution of the agreement. This was necessarily by mutual consent, and neither party can take advantage by complaint of that act. The case is rested, however, on this point, upon the argument by appellee that the contract contemplated not merely going back to their former relation, but permanently continuing in it; that the wife's undertaking on this score can not be fulfilled short of the death of one of the parties, for, so long as they both live, she might leave him. It is then argued that, so long as she owes him any part of this undertaking (*i. e.*, to live with him as his wife), it is a duty that could not be enforced against her by the court; that no civil court ever has attempted to compel two people to so live together, no matter which was in fault. Therefore it is claimed there is lacking that mutuality of remedy necessary to the enforcement in equity of this contract. Marriage contracts and marriage articles have been upheld and enforced by the courts from earliest times. They involve an agreement between a man and woman to assume the marital relation,—to live together as husband and wife,—in consideration of which each relinquishes his or her claim to the other's property, or one agrees to convey or deliver to the other certain

property or money. If they, in pursuance of the agreement, did marry and live together as husband and wife, the contract has been considered always as executed, so far as that part of the undertaking was concerned. It has been held that neither misconduct of a party after marriage (*Moore v. Moore*, 1 Atk., 272; *Sidney v. Sidney*, 3 P. Wms., 269; *Seagrave v. Seagrave*, 13 Ves., Jr., 439; *Fisher v. Koontz*, 110 Iowa, 498, 80 N. W., 551), nor the subsequent divorce of the parties, in the absence of some term in the contract providing against such contingency, or of some statutory regulation of the subject, affect the validity of the marriage settlement (*Evans v. Carrington*, 2 De Gex, F. & J., 481; *Barclay v. Waring*, 58 Ga., 86; *Babcock v. Smith*, 22 Pick., 61; *Child v. Pearl*, 43 Vt., 224). Bonds for the payment of money have been enforced upon the executed consideration of marriage. *Smith v. Patterson*, Cheves, Eq., 29; *Ancker v. Levy*, 3 Strob. Eq., 197; *Logan v. Wienholt*, 1 Clark & F., 611. The promise of a woman to marry a man was held a sufficient and valuable consideration to support his deed to her, where it appeared that she had been prevented from executing the promise without her fault, but by his death. *Smith v. Alken*, 5 Allen, 454, 81 Am. Dec., 758. The marriage contract (that is, the agreement to marry) is complete and executed when the parties to it have entered into the married relation in the manner required by statute. Undoubtedly every valid marriage contemplates that the parties shall live together as husband and wife "till death them do part." In a case like the present one the agreement to live together as husband and wife could include nothing more on this point than the original vows of matrimony did. To say that marriage was not an execution of that part of a marriage settlement between a

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man and a woman, competent to marry, as would require the performance of the other undertakings in the settlement, would be to practically destroy that which for time out of mind has been regarded as a subject of such contracts, for it would necessarily postpone the execution of the remaining part of such contracts till the death of one of the parties; thereby substantially destroying their value, in many instances, to the party benefited, and intended to be protected by them. We must hold, in reason and under the authorities, that this feature of the contract under consideration was executed by the resumption of the parties of the marital relation and duties. What relief appellee would be entitled to, as to a restoration of the property, or some part thereof, if Mrs. Moayon should subsequently abandon him without cause, is a question we do not determine.

4. Does the contract sufficiently describe the property to be conveyed? The description in the contract is: "One-third of all his [appellee's] estate, real, personal, or mixed, of whatever kind or nature, belonging to him in his own right, which he acquired under the will of Hannah Moayon, his mother, as well as all the other estate otherwise acquired or now owned by him." Can the intention of the parties, and the property to be affected by the writing, be gathered from this description? If so, the statute is complied with. It is the purpose of the description of the property concerning which a contract is made, to identify it. As said in *Warvelle on Vendors*, vol. 1, section 96: "While an unequivocal description, giving location, area, and boundaries, is a literal and perfect observation of the rule, a less particular statement will usually suffice, provided it contains within itself the proper means of identification, as by reference to extrinsic facts

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or other instruments by means of which the land can be ascertained with sufficient certainty." The ideal, perfect description is preferred. But we can not compel its adoption. It is our business to treat with such contracts as the parties have made, enforcing them when lawful and practicable. It is not necessary, then, that the writing should do more than indicate clearly what property is to be affected by it, if its description or identification can be gotten from the contract, or from any extrinsic fact or writing referred to in the contract. A portion of the property may be identified by the will of Hannah Moayon, specifically referred to in the contract. It is necessarily of record to be a will, and that record will satisfy so much of the contract as treats of so much of appellee's property as derives its title from that source. The remainder of the description is: "All the other estate otherwise acquired or owned by me." In *Warvelle on Vendors*, section 135, it is said that a description as "my house and lot" imports a particular house and lot, rendered certain by the description that it is the one that belongs to "me." The following descriptions have been held sufficient: "My lot on the plat in the town of S., on the plat of said town, on the river bank" (*Colenck v. Hooper*, 3 Ind., 316, 56 Am. Dec., 505); the "Snow farm" (*Hollis v. Burgess*, 37 Kan., 487, 15 Pac., 536); "H's place at S." (*Hodges v. Kowing*, 58 Conn., 12, 18 Atl., 979, 7 L. R. A., 87); the "Knapp home property" (*Goodenow v. Curtis*, 18 Mich., 298); an agreement to convey land described as "occupied" by the vendor or a third person (*Angel v. Simpson*, 85 Ala., 53, 3 South., 758; *Towle v. Carmelo Land & Coal Co.*, 99 Cal., 397, 33 Pac., 1126; *Doctor v. Hellberg*, 65 Wis., 415, 27 N. W., 176). In all such cases parol evidence was admitted not to identify, but to desig-

nate, the subject-matter, already identified in the minds of the parties, in the language of the contract when read in the light of the facts. In this State, in *Overstreet v. Rice*, 4 Bush, 3, 96 Am. Dec., 279, the expression, "We have swapped farms," naming the terms, but without further description of either farm, was held sufficient, after the parties had themselves identified the lands intended to be affected, by taking possession of them. In *Ellis v. Deadman's Heirs*, 4 Bibb, 466, the writing was: "4 January, 1808. Received of Jesse Ellis \$—, in part pay for a lot he bought of me in the town of Versailles; it being the cash part of the purchase of said lot. Nathan Deadman," This court said: "Had the receipt specified the terms of the agreement, there would have been no doubt of the propriety of decreeing the specific execution." It is as essential that the terms be specified as the description of the property. "Ten acres adjoining him on the north," in a bond for title to land of the vendor adjoining the vendee, was held sufficient in *Hanly v. Blackford*, 1 Dana, 2, 25 Am. Dec., 114. In *Henderson v. Perkins*, 94 Ky., 211, (14 R., 782) 21 S. W., 1035), the description was, "my home place and storehouse." It was held sufficient, on the authority of *Ellis v. Deadman's Heirs*, *supra*, and *Hanly v. Blackford*, *supra*. In the case of *Varnum v. State*, 78 Ala., 28, the description was: "My entire crop of every description, raised by me, or caused to be raised by me, annually till this debt is paid." While that was not concerning real estate, it was such a contract (one not to be performed within a year) as was, by the statutes of frauds, required to be in writing. Concerning that description that court said: "It is objected to the admission in evidence of this mortgage that it was void for uncertainty in the description of the crops intended to be

included in it. Whatever force there may be in this objection to the instrument on its face, this alleged uncertainty was capable of being removed, when read in the light of the circumstances surrounding the contracting parties at the time of its execution, by extraneous parol identification." Parol evidence can not be introduced to vary, enlarge, or restrict the written terms of the contract. But frequently it is the case that application of apparently vague descriptions must be by parol testimony, which puts before the court the facts and circumstances surrounding the parties when the contract was made or is to be executed, that its terms may be interpreted by the light from such surroundings. From this rule springs the maxim, "That is certain which can be made certain." In this case it has been said, "all" means all. "All of my land" is a description, by necessary implication and common understanding, referring to such lands as I may own, evidenced by the public records where land titles are required to be recorded, or to my actual and continuous possession for such time as under the law constitutes a title. This identification is complete, and admits of no possibility of mistake in this case. Applying to it the familiar usage of the courts in such matters, parol testimony may be allowed to designate the particular properties described and identified by the writing, and in the contemplation of the parties in making the contract.

5. It is true that, by the common law, contracts between husband and wife were void. Yet equity recognized numerous instances in which the parties had peculiar property rights which they were allowed to personally control, and to make contract concerning. It would be an anomaly and a reproach to the law to say that it recognizes a legal property right in one, to whom all the doors of every

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court were closed. Therefore it was early held (Story's Eq. Jur., 1372) that, although contracts between husband and wife are void at law, they are not always so in equity. This court has repeatedly affirmed the same doctrine. In *Evans v. Evans*, 93 Ky., 510, 14 R., 628, 20 S. W., 605, it was said: "Generally, if a contract between husband and wife merely be just and reasonable, and would be good at law when made by the husband with a trustee for the wife, it will be upheld in equity." This case was followed in *Bohannon v. Travis*, 94 Ky., 59, 14 R., 912, 21 S. W., 354. In *Ward v. Crotty*, 4 Metc., 59, it was affirmed that the husband's contract with the wife would be specifically enforced against him in equity, without the intervention of a trustee. This has been adhered to in *Maraman's Admr. v. Maraman*, 4 Metc., 89, and *Campbell v. Galbreath*, 12 Bush, 459. It is further re-enforced by legislative enactment looking to the same end, viz., section 34 of the Civil Code, as follows: "In actions between husband and wife; in actions concerning her separate property; and in actions concerning her general property, in actions for personal suffering or of injury to her person and character, in which he refuses to unite, she may sue or be sued alone." The wife may maintain her action.

It follows that the judgment must be reversed, and the cause is remanded for further proceedings not inconsistent herewith.

Commonwealth v. Tarvin, Judge.

CASE 97—APPLICATION FOR A WRIT OF MANDAMUS BY THE COMMONWEALTH OF KENTUCKY AGAINST JAMES P. TARVIN, JUDGE.—FEB. 17.

Commonwealth v. Tarvin, Judge.

APPLICATION FOR WRIT GRANTED.

APPEAL—TIME FOR PRAYING—JUDGMENT WHEN FINAL.

Held: 1. A motion for new trial suspends the judgment until the motion is overruled, and until such time there is no judgment, within the meaning of Cr. Code, section 348, which provides that the appeal must be prayed during the term at which the judgment is rendered, and shall be granted if the record is lodged in the clerk's office of the court of appeals within sixty days after the judgment.

C. J. PRATT, ATTORNEY GENERAL, AND D. A. GLENN, FOR COMMONWEALTH.

GEORGE WASHINGTON AND JOE L. ELLISON, FOR DEFENDANT.

(No briefs.)

OPINION OF THE COURT BY CHIEF JUSTICE BURNAM, GRANTING WRIT.

The Bavarian and other brewing companies were indicted by the grand jury of Kenton county for a violation of section 3915 of the Kentucky Statutes, which is a section of the act of May 20, 1890, prohibiting combinations by corporations, partnerships, individuals, or persons, or associations of persons, for the purpose of regulating, controlling, or fixing the price of any merchandise, manufactured article, or property of any kind. Section 3917 prescribed a fine of not less than \$500 nor more than \$5,000 for the violation of the preceding section. A trial of the defendants under the indictment on the 8th of October, 1902, resulted in a verdict for the defendants, which was rendered under a peremptory instruction from the court. On the following day the Commonwealth's attorney for

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that district filed grounds and entered a motion for new trial. At the sitting of the court on October 29, 1902, the motion was continued by consent. On October 20, 1902, the motion was again continued for two weeks, but the record does not show at whose instance. On November 4th the motion was again continued for two weeks. On November 24, 1902, the motion for a new trial was set for oral argument on December 8, 1902. On December 8, 1902, the defendants moved the court to strike the motion and grounds for a new trial from the file, and the argument on the motion for a new trial was continued until December 15th. On December 22d both motions were submitted, and on December 26th the trial court overruled the motion of the Commonwealth for a new trial, to which the plaintiff excepted, and asked the court to grant it an appeal to the court of appeals. Defendants objected to this, and the court took time. On December 30th the Commonwealth's attorney moved the court to dispose of his motion for an appeal, which was first made on December 8, 1902, and this motion was finally submitted on January 12, 1903. At a sitting of the court on January 21, 1903, the motion of the Commonwealth for an appeal to the court of appeals was overruled, and the appeal refused, to which the Commonwealth excepted. On the 28th of January, 1903, the Commonwealth of Kentucky, by C. J. Pratt, attorney general, appeared in this court, and filed a certified transcript of the orders of the court below, and asked that a writ of mandamus should issue against the Honorable James P. Tarvin, judge of the Kenton circuit court, requiring him to grant an appeal from the judgment of the Kenton circuit court overruling the motion, to which the Honorable James P. Tarvin, as judge of the Kenton cir-

cuit court, filed a response, in which he says, in substance, that he had reached the conclusion that the Commonwealth was not entitled to file a motion for a new trial in the case, and that he, as judge of the Kenton circuit court, had no jurisdiction to pass on same, and that more than sixty days having elapsed since the rendition of the judgment on October 8, 1902, before the Commonwealth moved for an appeal, its motion came too late, and was consequently overruled.

By section 347 of the Criminal Code, the court of appeals is given appellate jurisdiction of penal actions and prosecutions for misdemeanors, if the judgment be for the defendant, in cases in which a fine exceeding \$50 might have been inflicted. Section 348 provides: "The appeal must be prayed during the term at which the judgment is rendered, and shall be granted upon the condition that the record be lodged in the clerk's office of the court of appeals within sixty days after the judgment." Section 350. When the Commonwealth attorney prays an appeal, the clerk shall forthwith make and certify a complete transcript of the record and transmit the same to the attorney general, or deliver it to the Commonwealth's attorney for that purpose. And if the attorney general on inspecting the same believe it proper to take the appeal, he shall do so by filing the transcript in the clerk's office of the court of appeals in sixty days after judgment." There has been no change in these provisions of the Code since it took effect, on the 1st of July, 1854. In *Commonwealth v. Adams*, 55 Ky., 338, which was decided in 1855, this court construed these sections of the Code, and held, first, that appeals from judgment of circuit courts in misdemeanor cases must be taken at the term at which the judgment was rendered, and the rec-

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ord filed in the clerk's office of the court of appeals within sixty days after judgment. In *Commonwealth v. McCready*, 59 Ky., 377, the ruling in the *Adams Case* was adhered to. But it appears that in that case, after judgment was rendered and the motion for a new trial had been overruled, time was given, by consent of parties, until the first day of the next term to file a bill of exceptions. And it was held to be still incumbent upon the appellee to file the record within sixty days after the judgment. In the case of *The Louisville Chemical Works v. Commonwealth*, 71 Ky., 179, it was held that a motion for a new trial suspended the judgment, and that no appeal could be prosecuted until after the motion for a new trial had been disposed of. The court, through Judge Pryor, said: "No appeal can be taken by either party (plaintiff or defendant) to this court from the judgment of an inferior court, in a case like this, without first making a motion for a new trial in the court where the error complained of occurred. Upon the hearing of the motion, if overruled, the party complaining files his bill of evidence, and is then in a condition to bring his case to this court, and not before. If either party should bring the case here upon the judgment alone, with the motion for a new trial pending in the lower court, or without having made such motion, the dismissal of the appeal would be the inevitable result. If appellants had appealed from the judgment in this case at the time it was entered, viz., at the November term, and filed their record in this court, with the motion for a new trial pending in the lower court, and continued over until December term, we are at a loss to perceive how this court could take jurisdiction and try the appeal. There is no judgment, in fact, upon the verdict of a jury, until the motion for a

new trial, if made in proper time, is disposed of. This motion suspends the judgment, and it has no more effect than the verdict of the jury until the application for a new trial is overruled. Any other construction of the law would deprive the parties of the right to an appeal in all cases where the court, for prudential reasons, or otherwise, saw proper to continue the motion from one term to another,—a right that the court can exercise, and over which neither the counsel nor his client has any control." It seems to follow from these provisions of the Code, and from the construction given them in the case quoted, that a motion for new trial was necessary, to enable this court to correct errors growing out of the evidence or instructions given to the jury in the court below. This court has uniformly held that a motion for a new trial suspends the judgment in a civil case, and may be continued and passed on at a subsequent term. See *Louisville Rock Lime Co. v. Kerr*, 78 Ky., 12; *Harper v. Harper*, 10 Bush, 447; *Turner v. Johnson* (18 R., 202) 35 S. W., 923; and *Trapp, etc., v. Aldrich* (23 R., 2430), 67 S. W., 834.

We are therefore of the opinion that the motion for a new trial had the effect to suspend the judgment until it was finally overruled, or, in other words, that the judgment only became final when the motion for a new trial was finally overruled, and that, under section 348 of the Criminal Code, it was the duty of the defendant to have granted the appeal prayed; and he is directed to conform his rulings in this matter to the views herein expressed, and order will go as prayed.

Harris v. Tuttle.

CASE 98—ACTION BY E. A. TUTTLE AGAINST H. S. HARRIS AND OTHERS TO ENFORCE A MORTGAGE LIEN.—FEB. 17.

Harris v. Tuttle.

APPEAL FROM BARREN CIRCUIT COURT.

JUDGMENT FOR PLAINTIFF AND DEFENDANT, HARRIS, APPEALS. AFFIRMED.

PARTNERSHIP—MORTGAGE—FIRM DEBTS—PRIORITY.

Held: 1. Each of two partners gave a mortgage on an undivided one-half of the partnership property to secure a personal debt, but before they were recorded, the partners gave a mortgage on the firm property to secure a prior debt. One of the partners testified that the other partner understood when the first mortgages were given that they only gave a lien on their interest in the property after the partnership debts were paid, each partner reserving his equitable lien for the payment of partnership debts. The other partner contradicted such testimony, but the mortgagee in the firm mortgage testified that the latter partner stated that there was no prior mortgage lien. The lower court held that all the firm's debts were superior liens and should be paid before the individual debts of the partners and this judgment is affirmed.

JOHN W. RAY AND STURGEON & JAMES, FOR APPELLANTS.

POINTS DISCUSSED.

1. The equitable lien of general creditors of a partnership on the partnership property is derivative only. They can only assert such lien when the partners themselves can do so.

2. When the partners, Harris and Bowen, each on the same day and with a previous agreement so to do, executed to appellant, Harriet S. Harris and to appellee, Tuttle, separate mortgages for the same sum, on the partners' undivided one-half of the partnership property, all right of the partnership lien was waived.

3. As to the debt of \$400, for which a mortgage was executed to the banking company can have no lien derived from the partners. It must stand on the date of its lodgment for record. This was subsequent to the mortgage of appellant on the separate interest.

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CITATIONS.

78 Ky., 33, *Couchman v. Maupin*; 2 Met., 356, *Jones v. Lusk*; 13 B. M., 414, *Wilson v. Soper*; 6. B. M., 128, *Pearson & Anderson v. Keedy*; 95 Ky., 512; *Hill v. Cornwall & Bro.*; 16 B. M., 237, *Ely v. Hair*; 121 U. S., 310, *Huiskamp v. Moline Plow Co.*; 45 Fed., 648, *Lockett v. Rumbaugh*; 122 Mo., 431, *Goddard Gro. Co. v. McCune*; 102 Wis., 317, *Excelsior Mill Co. v. Hanover*; 43 Am. St. Rep., 374, note.

W. L. PORTER & V. H. BAIRD, FOR APPELLEE.

POINTS DISCUSSED AND AUTHORITIES CITED.

1. It is established by the proof, in the record, that the mortgage of appellant, on the undivided interest of J. T. Harris, is superior to the mortgage of appellee, Tuttle, on the same property.

2. Does not the facts show that the lien of appellee is superior to that of appellant by the equitable rule of subrogation? *Couchman's Admr. v. Maupin*, 78 Ky. Rep., p. 39; 20 Law Rep., 1502; 21 Law Rep., *Henley v. Farris*, 103 Mo., 78 and 23 A. M., State Rep., 863.

3. If the mortgage of the appellee is inferior to that of appellant, and also not superior by the rule of subrogation, then if the partners and the firm were insolvent at the time of the execution of appellant's mortgage, and appellant knew that fact, would not the general rules of equity defer appellant's debts until the firm debts were paid? *Parsons on Contract*, 228 and 121.

4. If a partnership is insolvent can either partner waive his equitable lien and thereby defeat the firm creditors in the collection of their defects? *Jackson Bank v. R. W. Durfey, &c.*, 72 Mis., 971, and Book 31, L. R. A., 470. *Davies v. Adkinson*, 124 Ill., 474, and 7 Am. St. Rep., 373; *Wilson v. Soper*, 13 B. M., 415, 45 N. J. Eq., 186 and 14 Am. Stat. Rep., 712.

OPINION OF THE COURT BY JUDGE NUNN—AFFIRMING.

The substance of the facts in this case appear to be that J. T. Harris, who is a son of appellant, H. S. Harris, and S. L. Bowen, who is a son-in-law of appellee, E. A. Tuttle, formed a co-partnership under the style of the Glasgow Electric Light & Power Company. They were equal partners. Each borrowed the capital with which he began,—Harris, from his mother, appellant; and Bowen from his father-in-law, Tuttle, appellee. The sum loaned

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in each instance was \$7,500. It was agreed all along that each was to give a mortgage on the undivided one-half of the property to secure the loan made. On the 27th of May, 1898, the final amount to make the \$7,500 was loaned to Harris by his mother, and on that day he executed to her his note for the full sum, and also executed a mortgage to her on his one-half of the property to secure the note, as he had agreed to do. On the same day, Bowen executed a note and a mortgage to appellee, Tuttle, for the like sum of \$7,500 to secure the loan from him, as he had agreed to do. These mortgages were not acknowledged and lodged for record until June 17, 1898. On May 31, 1898, just four days after the execution of the notes and mortgages, but before they were acknowledged and lodged for record, Harris and Bowen executed a note and mortgage to Trigg & Co., to secure a prior indebtedness, in the sum of \$4,000. This mortgage to Trigg & Co. was filed and recorded November 8, 1898. This note and mortgage for \$4,000 was sold and transferred by Trigg & Co. to appellee, E. A. Tuttle, and he brought suit upon it on the 21st day of January, 1899, against Harris & Bowen, as partners, and Annie M. Bowen and H. S. Harris, etc. Appellee alleged in his petition that his lien for the \$4,000 mortgage debt was a prior lien over the mortgage debt of himself and that of appellant, H. S. Harris, for \$7,500 each. The appellant filed an answer denying this allegation, and alleging that her mortgage was a superior lien to that of appellee, for the \$4,000 debt, or any one else, except the mechanic's lien of E. B. Davis. The special commissioner in the case reported, and the lower court adjudged, that all of the firm's debts were superior liens, and should be paid before the individual debts of the two partners; and on

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this judgment Tuttle received on his \$4,000 debt and its interest the sum of \$3,529.50, and the appellant, H. S. Harris, excepted to this judgment, and is now here on appeal.

Appellant claims that by the mortgage of her son to herself, and H. L. Bowen to his father-in-law, Tuttle, of their undivided half, each, of the partnership property, they by that act waived all their rights to partnership liens, and that the general creditors of the partnership have no lien upon the partnership property; that their lien is derivative only; and that they can only assert such lien when the partners themselves can do so. Admitting this to be true, the mortgages were each executed individually,—Bowen to Tuttle, and Harris to his mother,—conveying each of their undivided half interests in said partnership property. And construing these mortgages, they only put in lien to the mortgagees their interests in the property after the partnership debts were paid; each partner reserving his equitable lien upon all the property for the payment of partnership debts. Bowen swears that this was the understanding with Harris at the time these individual mortgages were executed. Harris contradicts him in his testimony. Trigg and Dickinson, of the firm of Trigg & Co., corroborate Bowen. They say that they made the loan of \$4,000 to Bowen & Harris directly with Harris, and that they would not have loaned the money to them except upon the statement of Harris, that there was no mortgage lien of any kind upon the property.

For these reasons the judgment of the lower court is affirmed.

Hall and Others v. Metcalfe.

CASE 99—ACTION BY T. T. METCALFE V. JULIA A. HALL, &c. TO ENFORCE A MORTGAGE LIEN ON LAND.—FEB. 17.

Hall and Others v. Metcalfe.

APPEAL FROM KENTON CIRCUIT COURT.

JUDGMENT FOR PLAINTIFF AND DEFENDANTS APPEAL. REVERSED.

FORECLOSURE—DECEDENT'S ESTATE—ALLOWANCE OF ATTORNEY'S FEES
—PAYMENT OF MORTGAGE DEBT BEFORE JUDGMENT—TAXATION OF
COSTS—OBJECTION TO DEPOSITIONS—NOTICE—PROOF OF DEBT.

Held: It is too late, on appeal, to object to depositions as taken without notice.

2. Decedent left no personal estate. A mortgagee instituted foreclosure, making the widow, son, and administrator defendants, and also another creditor. The widow then sold the land and paid all the debts. At the settlement the mortgagee's attorney demanded a fee of \$75; the administrator's attorney, one of \$50; and a cost bill of \$19.35 was presented. The mortgagee stated, without contradiction from his attorney, that the latter's fee was to have been \$20; and the administrator denied employing his attorney, though he later, in an affidavit, demanded the allowance of a fee for him. The note secured by the mortgage was proved by affidavit prepared by the holder. An amended petition, containing averments authorizing a reference to a commissioner to settle the estate, was not filed till after the payment of the debts. HELD, that neither attorney was entitled to a fee.
3. The mortgagee's debt not having been paid till after foreclosure was instituted, he was entitled to costs accruing to the time of payment, including \$5 as an attorney's fee, as is usual in equitable actions.
4. In the foreclosure of a mortgage on a decedent's estate, it appeared that after suit was instituted a third person placed \$600 in the mortgagee's hands, with which to effect a purchase at commissioner's sale. The third person then bought from the widow and son for \$350, paying them the balance above the \$600. The mortgagee then settled with the third person by returning \$42; having retained enough to pay his mortgage debt and interest, and \$15 in satisfaction of another claim. HELD, that it was error to decree a sale of the property, as the mortgagee's debt had been paid.

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WALKER C. HALL, ATTORNEY FOR APPELLANT.

(No brief for appellant.)

L. L. MANSON & B. F. GRAZIANI, ATTORNEYS FOR APPELLEE.

This is a suit by appellee against the administrator of C. L. Hall, deceased, and his widow and heirs and creditors, to settle his estate and enforce a mortgage lien on a note for \$500 owing to appellee by said decedent and in which the plaintiff asks his attorney's fees and costs.

The appellant has filed a record in this case upon which it was not tried below; there are alleged depositions in the record, but nowhere were they ordered filed or any notice served on the appellee, and should not be considered by this court.

We urge that, first, the appellee brought this suit for the purpose of enforcing his mortgage lien, that appellant, through some trickery of his attorney, endeavored to change the relationship between the parties by secretly attempting to settle, but failed to settle, and then afterwards endeavored to take and file depositions without giving notice to appellee.

It appears to us that the appellant is not with clean hands before the court, and we are entitled to a judgment for the amount of money due us and for a sale of the property to satisfy the judgment, interest and cost.

OPINION OF THE COURT BY JUDGE SETTLE—REVERSING.

Charles L. Hall died in Kenton county, Ky., intestate. The appellant Julia A. Hall is his widow, and the appellant Edward Hall his son and only heir at law. On November 21, 1900, one R. J. Perry was appointed and qualified as the administrator of his estate. On November 24, 1900, this action was instituted by appellee in the Kenton circuit court to enforce a mortgage lien that had been given him on a small tract of land by the decedent and his wife to secure a note of \$500, in which action R. J. Perry, as administrator of the estate of the decedent, the latter's widow and son, and Samuel Stephens were made defendants. The petition alleges that appellee, T. T. Metcalfe, and Samuel Stephens were the only creditors of the estate, but fails to allege that the decedent left no personal estate, or not enough thereof to pay his debts; nor does it state

the amount or nature of the claim held by Samuel Stephens against the estate. The prayer of the petition asks a sale of the mortgaged real estate to pay appellee's debt, and a reference of the cause to the master commissioner for settlement of the estate, and that appellee be allowed his costs, including attorney's fees. The administrator filed answer, in which he states his appointment and qualification as administrator; that, so far as he knows, Metcalfe and Stephens were the only creditors of C. L. Hall's estate, and, further, that the mortgage note of appellee contained usury, as it calls for 8 per cent. interest, when only entitled in law to bear 6, and asks that the note be purged of usury, which would leave \$468.16 due appellee, instead of the larger sum claimed. The answer, like the petition, is silent as to the nature and amount of the Stephens debt; and it also fails to state what personal estate, if any, was left by the decedent, but concurs in the prayer of the petition for a reference and settlement, and asks an allowance to himself and attorney. It appears from the record that the appellant Julia A. Hall had ascertained that her deceased husband owed about \$250 in addition to appellee's debt, and a part of this sum she paid; but, being desirous of paying all his debts, she effected a sale of the little farm covered by appellee's mortgage, which was all the estate left by her husband at \$850, which sum was sufficient to pay the debts in full, and leave her and her son \$50 or \$75. The answer of appellants averred that all the debts of the decedent, including that of appellee, had been fully paid by them; and they exhibited with their answer a schedule containing the names of the creditors, and the sums paid them, respectively, which showed the aggregate indebtedness to be \$832.52, paid out of the proceeds realized from the sale of the farm, leaving to appellants \$32.48. Appellee filed a reply tra-

versing the averments of appellants' answer, and appellants thereupon took the depositions of several witnesses, which were duly filed with the clerk of the Kenton circuit court before the submission of the case, as appears from an order of court. It is contended by counsel for appellee that the depositions were taken without notice, or upon insufficient notice, and therefore they should not be considered by this court. If they were taken without notice, exceptions should have been filed to them in the lower court, and before the submission of the case; but as the record fails to show that they were excepted to in that court, it is too late to object to them now, and in this court. The depositions furnish indisputable evidence to the effect that as far back as December 21, 1900, which was less than a month after the institution of appellee's action, one J. C. Cotton, who afterwards became the purchaser of the farm from appellants, learning of the mortgage debt of appellee, went to see him, and advised him of his purpose to purchase the farm; and appellee told him that he did not wish to buy the farm, but would buy it for him (Cotton); and the latter then placed in his hands \$600 as a guaranty that he would take the farm if appellee would buy it for him at commissioner's sale, and, for the \$600 then left with him, appellee executed to Cotton his duebill. It is further shown by the proof that Cotton then learned that appellants were endeavoring to sell the farm through Foster, a real estate agent; and he bargained for the place through Foster at the price of \$850, and paid to appellant Julia A. Hall, and certain of the creditors, all of the purchase price over and above the \$600 in appellee's hands; and, upon receiving of appellants a deed conveying him the farm, Cotton again saw appellee, who settled with him, paying back to him \$42 out of the \$600 which had been left with him by Cot-

ton. and, after paying the \$42 to Cotton, he claimed that the sum retained by him only equalled the principal and interest of his mortgage debt, and a medical bill of \$15 which appellant Julia A. Hall owed him. Thus we find that appellee not only received the amount of his mortgage debt, but, in addition, that he appropriated to the liquidation of a medical bill which he had against the widow the pittance going to her out of the money left in his hand after satisfying his mortgage debt. Notwithstanding the payment of his debt, appellee refused to release the mortgage lien which he held upon the farm purchased by Cotton of appellants. It appears that appellee's attorney, upon being informed of the sale of the land to Cotton, presented himself while the parties were making out a list of the debts to be paid out of the proceeds of the sale, and demanded the payment of a fee of \$75 for services rendered by him in this action in the lower court, a fee of \$50 for the attorney of the administrator, and a bill of \$19.35 costs, the payment of which fees and costs appellants refused. Appellee was also present when these fees were demanded, and he then stated in the presence of his attorney, and without contradiction from him, that the latter had agreed with him on a fee of \$20 for his services in the case. The administrator, upon being asked by the attorney of Cotton about the fee demanded by his attorney, denied that he had employed him, yet, in an affidavit afterwards filed by him in the case, he demanded the allowance of a fee to that attorney. The lower court, in the judgment rendered upon the submission of the case, allowed appellee's attorney a fee of \$40, a fee of \$15 to the attorney for the administrator, and ordered a sale of the land described in the mortgage of appellee to pay the debt sued on, and the costs of the action. This court is now asked to reverse that judgment.

We do not hesitate to say that the judgment in question is altogether erroneous. There was no necessity for the appointment of an administrator of the estate of the decedent, C. L. Hall, as there was no personal estate left by him. No proof of the appellee's debt was necessary, other than the statutory affidavit thereto attached, which seems to have been properly made by the holder of the note; and no demand for its payment before suit would have been necessary, had there been no administrator. The action to enforce the mortgage lien of appellee could have been maintained by simply making the widow and heir at law parties. Other creditors, if known, should also have been made parties. A reference to the commissioner in such a case would have presented their claims fully to the court, and given such relief as they were entitled to. The manner in which this action has been instituted and conducted is well calculated to excite suspicion that the recovery of attorney's fees, and their payment out of the estate of the decedent, is the end mainly sought to be attained. It is not the policy of the law, nor the aim of this court, to permit estates, small or great, to be consumed by unnecessary costs. The action was not one to settle an estate. The original petition contained no statement of fact that would have authorized a reference of the case to a commissioner for the purpose of ascertaining the estate's indebtedness, or to make a settlement thereof. In fact, the amended petition, which contained the only averment in the pleadings to the effect that the decedent left no personal estate, was not filed until after appellee and all other creditors had been paid what was due them from the estate.

We are of opinion that no attorney's fees should have been allowed by the lower court, either to appellee's attorney, or the attorney of the administrator.

Cumberland Tel. & Tel. Co. v. Louisville Home Tel. Co. (2 Cases.)

We are also of the opinion that the lower court erred in decreeing the enforcement of appellee's mortgage lien, and a sale of the land in satisfaction of the mortgage debt, for, according to the evidence, his debt was paid some months before the rendition of the judgment. But inasmuch as the debt was not paid until after suit was instituted, appellee is entitled to his costs incurred in the proceeding to enforce his lien down to the time of the payment of his debt—say, February 1, 1901. The costs to which he will be entitled should include a taxed attorney's fee of \$5, as is usual in actions in equity. In all other respects the appellants should be allowed their costs.

For the reasons indicated, the judgment of the lower court is reversed, and the cause remanded for further proceedings consistent with the opinion herein.

Petition for rehearing by appellee overruled.

CASE 100—TWO SEPARATE ACTIONS BROUGHT BY THE LOUISVILLE HOME TELEPHONE COMPANY AGAINST THE CUMBERLAND TELEPHONE AND TELEGRAPH COMPANY FOR INJUNCTION AND OTHER RELIEF.—FEB. 18.

Cumberland Telegraph & Telephone Co. v. Louisville Home Telephone Co. (Two cases.)

APPEAL FROM JEFFERSON CIRCUIT COURT, CHANCERY DIVISION.

JUDGMENT FOR PLAINTIFF AND DEFENDANT APPEALS. AFFIRMED.

FOREIGN CORPORATIONS—RIGHT TO SUE—TELEPHONE POLES—INTERFERENCE WITH ERECTION—INJUNCTION.

Held: 1. Where a foreign corporation had spent nearly \$500,000 in the construction of a telephone system in a city in the State under a franchise granted by the city, it had a right to sue in the courts of the State to protect its rights; and the fact that all of its incorporators but one were residents of the State,

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Cumberland Tel. & Tel. Co. v. Louisville Home Tel. Co. (2 Cases.)

and that the evident object of forming the corporation elsewhere was to obtain the benefit of less rigorous laws, could not defeat that right; it appearing that the State was not complaining.

2. Where a telephone company had been granted a permit to erect its poles on the same side of a street with the poles of another company, having a prior, but not exclusive, franchise, and the old company, whenever the new one started to put in poles of a certain height, immediately changed its own poles, and made them of such a height as to prevent the new company from proceeding, an injunction was issuable.

FAIRLEIGH, STRAUS & EAGLES, AND HUMPHREY, BURNETT & HUMPHREY, FOR APPELLANT.

HELM, BRUCE & HELM, FOR APPELLEE.

(No briefs in the record.)

OPINION OF THE COURT BY JUDGE HOBSON—AFFIRMING.

On August 17, 1886, by an ordinance of the city of Louisville, pursuant to an act of the Legislature approved April 3, 1886, the Ohio Valley Telephone Company was authorized to construct, operate, and maintain a telephone system on the streets of the city; but the ordinance contained this provision: "Nothing in this ordinance shall be so construed as to give the said telephone company, its successor or assigns, any exclusive right to erect poles or to lay underground conduits, pipes, cables, conductors or wires in the streets, avenues, alleys or sidewalks of the city of Louisville." The company accepted the provisions of the ordinance, and constructed its telephone system, which it maintained until the year 1900, when it was consolidated with the appellant, the Cumberland Telephone & Telegraph Company, and since that time the consolidated company has continued to maintain and operate this telephone system. On November 5, 1900, the general council of the city of Louisville passed an ordinance providing for the sale at public auction of the franchise or privilege to construct,

maintain, and operate a telephone system in the city; the purchaser to have the right to transfer or assign the franchise, provided the transfer was not made to any competing telephone system. It was also provided in the ordinance that the telephone system should be constructed in the public ways of the city, under the supervision of the board of public works, and that the franchise should not be construed as being in any way exclusive, or as preventing the council from providing for the sale of similar franchises to other persons. E. M. Coleman purchased the franchise, when sold at public auction under the ordinance, for the sum of \$10,000, and assigned his purchase to appellee, the Louisville Home Telephone Company—a corporation formed on March 20, 1901, under the laws of Delaware. It thereupon complied with the terms of the ordinance, by the execution of bonds to the city as required thereby, and began operations for the construction of its telephone system under permits from the board of public works. One of its lines, through the eastern part of the city, ran along Frankfort avenue; and, as the Cumberland Telephone & Telegraph Company had also a line along Frankfort avenue, notice was given it of the application, and a time fixed when both companies could be heard. They were heard by the board, and the board then, in person, visited the grounds, and, after looking over the actual situation, granted the permit as asked for by the appellee, which allowed it to erect its line on the same side of the street as the line of appellant, but on higher poles, and up above it. Appellee thereupon commenced building its line, and distributed its poles along the street for a considerable distance. These poles were 50 feet long. It set the poles for several squares, and was going on smoothly until one morning, when the workmen returned, they found that, since the last evening,

appellant had set just in front of them, along the street where appellee's poles were lying on the ground, waiting to be erected, its poles, forty-five feet long. As a 5-foot space was not sufficient for the operation of a telephone system, appellee hauled away its 50-foot poles, and set in place of them poles 55 feet high, so that it would have 10 feet of space above the top of appellant's 45-foot poles, and so continued to construct its line. After this, appellant took down its 45-foot poles, and substituted for them 50-foot poles, thus leaving appellee, as before, only 5 feet of space. At another point on the line, where appellant was maintaining 35-foot poles, appellee erected 50-foot poles, so as to leave 15 feet of space above them. After it had done this, appellant erected in the same line poles 50 feet long, notched exactly the same way as appellant's, so as to render it impossible for appellee to operate its line, as two telephone systems can not be operated on the same horizontal plane. At another point along the avenue appellant's poles were set out along the roadway; the street at this point not having been improved, or sidewalks constructed. Appellee set its poles, 50 feet long, on the line of the sidewalk. Appellant then set new poles, 55 feet long, in the same line. Appellee thereupon instituted these two actions to restrain appellant from interfering with it, and to require it to cut off its poles, or make its line in the plane 10 feet below it. The chancellor adjudged the relief sought, and the defendant appeals.

It is shown in the record that appellee, the Louisville Home Telephone Company, was formed in Delaware by incorporators, one of whom lived in Ohio, and the others in Kentucky. The articles of incorporation do not conform to the Kentucky laws, and it is urged that the incorporators evaded the laws of Kentucky to get privileges not granted

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here, and to avoid burdens placed by our law, and that, having gone to Delaware for this purpose, the corporation formed by them, should not on principles of comity be recognized by the courts of Kentucky, or allowed to sue here. The corporation may do business in Delaware or in any other State, and, while its incorporators seem to have contemplated that their main business would be done in Louisville, they are not by their articles confined to this State; and in fact they contemplated doing business in other States, as shown by the evidence. The purpose they had in going to Delaware to get their articles of incorporation does not clearly appear, except as it may be inferred from the fact that the laws of Delaware are not so rigorous as the laws of Kentucky. It is conceded that a foreign corporation is recognized in other States only as a matter of comity, but, owing to the intimate association of the people of the several States, corporations formed in one State have been universally recognized in other States, except in cases clearly forbidden by the policy of those States. Thus it has been held that a corporation formed in one State, which is not allowed to do business there, by the terms of its articles of incorporation, will not be recognized elsewhere. *Land Grant Railway v. Board of Commissioners*, 6 Kan., 245. And where the statutes of a State did not allow a corporation to carry on a mercantile business, citizens of that State, who had themselves incorporated in another State, and then did business as a corporation in the State of their domicile, were held liable as partners. *Empire Mills v. Alston Grocery Company* (Tex. App.), 15 S. W., 505, 12 L. R. A., 366. So where the charter of incorporation was not valid in the State in which it was made. *Montgomery v. Forbes*, 148 Mass., 249, 19 N. E., 342. Other cases may be found in which, what are denominated "tramp corpora-

tions" having become insolvent, their stockholders have been held liable in the State of their domicile as partners. 6 Thompson on Corporations, sec. 7895, 7896, and cases cited; Cleaton v. Emery, 49 Mo. App., 345; Hill v. Beach, 12 N. J. Eq., 31. On the other hand, the court of appeals of New York refused to follow this rule in a case where citizens of New York had obtained a West Virginia charter of incorporation, which contained no privileges not granted by the laws of New York. Demarest v. Flack, 28 N. E., 645, 13 L. R. A., 851. But no question of this sort arises here. This is not an application by the State, questioning appellee's power to act as a corporation. The objection is made by appellant when sued by appellee for an invasion of its rights. Appellee has not only been incorporated in the State of Delaware, but it has been recognized by the authorities of the city of Louisville as a corporation, and has been granted by it an important and valuable franchise. It is at least a *de facto* corporation, and the rule seems to be that, when an association of persons is exercising corporate franchises under color of legal organization, the existence of the corporation can not be inquired into collaterally, but only in a direct proceeding by the government. The reason of the rule is that it would produce endless confusion, and destroy the corporation, if the legality of its existence could be drawn in question in every suit to which it was a party, for then no judgment could be rendered which would finally settle the question. Where property has been granted to such a corporation and it brings a suit to recover its property, the defendant can not be allowed to inquire into the regularity of the organization in that suit, upon the broad principle of common justice and public policy. Agricultural Association v. Insurance Company, 70 Ala., 130; East Norway Church v. Froislie, 37 Minn., 477, 35 N. W.

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260; First Baptist Church v. Branham, 90 Cal., 22, 27 Pac., 60; Eaton v. Aspinwall, 19 N. Y., 119; Buffalo, etc., Railroad Co. v. Cary, 26 N. Y., 75; Exporting Co. v. Locke, 50 Ala., 332; Gill's Adm'x v. Mining Co., 7 Bush, 639. The stock of corporations is now sold every day in the market, and may in a short time entirely change hands, so that none of the original incorporators have any longer an interest in the corporation; and to allow a trespasser who had destroyed its property to defeat an action against him by the corporation on the ground that it was not originally properly incorporated, when the State has not complained, and the municipality has recognized and contracted with the corporation, would be a perversion of justice. It appears from the record that appellee has spent something like a half million of dollars in the construction of its telephone system under the grant referred to. It has been the policy of the State to invite foreign capital here, to aid us in the development of the resources of the State. This corporation has come here under that policy, and, in the absence of some express legislation, we are not at liberty to shut the doors of the court against it when suing for the protection of valuable rights granted to it by the municipality pursuant to the laws of the State. We rest our judgment here, and intimate no opinion on any other question discussed on the argument.

On the merits of the case we have little difficulty. Appellant's franchise was not exclusive. Its prior occupation of a particular space entitled it to the continued enjoyment of that space without substantial impairment by appellee; but this enjoyment is subject to such incidents as result from the exercise of the rights of appellee under its franchise, for it is necessarily implied in the grant to appellee that it is subject to such limitations as will enable

another to enjoy a like franchise. Otherwise the right of the first company obtaining a grant would amount to a monopoly. This was not intended. The grant to appellant is like other privileges in the public ways. It must be exercised in such a way as not unduly to interfere with the rights of others. The substance of its rights can not be appropriated by another, but there is no reason why two telephone companies can not operate on the same side of the street; and, from the proof in this case, it is not only common, but much better than to have them on different sides, when there are electric light lines on the street, or other wires carrying heavy currents of electricity. The city authorities may rightfully determine in what manner the streets may be used, and to what extent, and when, structures may be erected in them; and, within reasonable limits, to fix the space to be occupied by rival telephone lines. Of course, there must be no substantial impairment of appellant's property rights, but mere inconvenience must be endured by it, just as by all others, in the enjoyment of the public utilities of the city. After a careful reading of the record, we are unable to see that any substantial injustice was done appellant by the chancellor's judgment. On the contrary, it seems to us to have been in accord with the real equity of the case.

Judgment affirmed.

Whole court sitting.

Stapp v. Mason, &c.

CASE 101—ACTION BY MRS. NANNIE W. STAPP AGAINST T. P. MASON & C. F. CODY TO RECOVER OF THEM MONEY LOST BY HER HUSBAND BELONGING TO HER, AT A GAMING PLACE SET AND RUN BY THEM AND HER HUSBAND AS PARTNERS.—FEB. 18.

Stapp v. Mason, &c.

APPEAL FROM HENDERSON CIRCUIT COURT.

JUDGMENT FOR DEFENDANTS AND PLAINTIFF APPEALS. AFFIRMED.

GAMING STATUTES—CONSTRUCTION—RECOVERY OF MONEY LOST—RIGHTS OF CREDITORS.

Held: 1. Kentucky Statutes, section 1969, provides that whoever shall invite, persuade, or otherwise induce another to visit a place where any gambling, etc., is carried on, shall be responsible to such other and his creditors for whatever he may lose in gaming at such place. HELD, that such statute did not include a person who entered into a partnership for the purpose of conducting a gambling house, and lost money in the games played there, and hence a creditor of such person was not entitled to recover from the other partners the amount so lost.

THOMAS E. WARD, ATTORNEY FOR APPELLANT.

The errors committed to the appellant's prejudice were:

1. The refusal of the court to strike from the answer the second paragraph, which charged that C. A. Stapp had an interest in the gambling house where the money was lost, and had an interest in other gambling houses, and lost money in other gambling houses.
2. In permitting defendants to offer proof tending to prove these allegations.
3. In refusing to give the instructions offered by plaintiff.
4. In giving the instructions that were given.
5. Particularly in instruction No. 3, as given, to-wit, that if the jury should believe that C. A. Stapp was interested in the gambling house, they would find for the defendant.

The court proceeded upon the idea that the case was within the principle announced in the cases of *Brown v. Thompson*, 14 Bush, 538, and *Elias v. Gill*, 92 Ky., 569, and some others. These cases simply lay down the doctrine that one engaged in setting up or operating a gambling house can not recover back money won from the house by those who bet against it.

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Here the contention was that the husband's alleged interest, if believed by the jury, prevents the wife from recovering. And this theory was continually presented to the jury by the court, over her objections.

Our theory was that the plaintiff had not gambled herself, nor authorized her husband to gamble,—knowing nothing of his having gambled until after he had lost all her money,—and was not affected by these shortcomings of his. No pretense was made that she knew anything at all of his gambling.

The weight of his sin was put upon her. She was made to take his place. The opprobrium of being a common gambler, of setting up and operating gambling houses was poured out upon her just as though she had been the real culprit. This was prejudicial to her, and furnished absolutely no protection to the defendants.

When she had shown that her husband had lost her money to the defendants, and that it had not been paid back to her, her case was made out, and she was entitled to recover on either of two grounds:

1. Because the money was hers, and her husband had parted from it to another without her knowledge or consent; or

2. By gambling off her money he became indebted to her, and she could sue to recover the money lost at gambling, under the statute, just as any other creditor might.

They did not deny, or attempt to deny, that the money was hers. In fact, the checks introduced were all signed "Nannie W. Stapp, by C. A. Stapp, agent." The money was not only hers, but they had notice of it.

They did not attempt to show that any part of it had been returned to her. Their defense was that they were no worse than C. A. Stapp, and the ruling of the court in the premises, said in effect, to the jury: "Gentlemen, if you believe that C. A. Stapp is as bad as those defendants, you must find for them against his wife."

In this, I think an error to her prejudice was committed against her, and for this the case should be reversed and remanded, and a new trial should be awarded, in which her claim against the defendants should be submitted to the jury with those objectionable features eliminated.

A. O. STANLEY, FOR APPELLEES.

QUESTIONS DISCUSSED AND AUTHORITIES CITED.

1. A case within the letter, but not within the spirit of a remedial statute, is not embraced by it. The courts go beyond the letter to the legislative purpose and intent, and will not by a

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blind adherence permit the law to become a shelter to those it was meant to punish. *Brown v. Thompson*, 14 Bush, 539; *Elias & Shepherd v. Gill*, 92 Ky., 573.

2. The creditor of the loser can only recover where the loser himself could have recovered, his interest being a contingent vested interest in the gamblers' losses, of which he can not afterwards divest himself. *Caldwell v. Caldwell*, 2 Bush, 443.

3. Where a marriage is contracted and property acquired prior to the act of 1894, the husband's rights in the property of his wife are governed by the old law and not the new statute. *Rose v. Rose*, 20 Rep., 418; *Mitchell v. Violett*, 20 Rep., 378.

4. Where a marriage occurs and property is acquired prior to the act of 1894, the husband who reduces the personal property of the wife to possession and converts it into cash, thereby acquires complete legal right to it. *Hurt v. Courteney*, 4 Met., 143; *Rowling & Boucher v. Winslow's Admr.*, 5 B. Mon., Lead. Cases, 351.

OPINION OF THE COURT BY JUDGE HOBSON—AFFIRMING.

As shown by the evidence in the case, and, in substance, found by the verdict of the jury, C. A. Stapp, the husband of appellant, Nannie W. Stapp, in connection with T. P. Mason and C. F. Cody, opened a gambling house in the city of Henderson, which they ran for some time; getting a take-out on all the games played there. C. A. Stapp played in these games, and lost a considerable amount of money, which was the property of his wife, Nannie Stapp, and which he held as her agent. She thereupon filed this suit to recover of her husband's partners the money thus lost by him at the gaming place set up by him and his partners, on the ground that they had enticed him into playing there by setting up the gaming place. The suit seems to have been brought under section 1969, Kentucky Statutes, which is as follows: "Whoever shall invite, persuade or otherwise induce another to visit any place where any gaming mentioned or included in section one thousand nine hundred and sixty of this chapter is carried on, shall be fined from fifty

to five hundred dollars, and, moreover, be responsible to such other and his creditor for whatever he may lose in gaming at such place." It is charged in the petition that the husband, by betting and losing the money of his wife, became indebted to her in that amount, and that she thereby became entitled to sue for and recover it. It is earnestly maintained that, although the husband himself could not maintain the action against his partner, the wife, who was innocent of any wrong, and is his creditor, may maintain it. But back of this is the question whether the husband is one of the persons provided for by the section, for, if he is not covered by the section, then his creditors stand in no better light than he, for they are creditors of a person not provided for by the section, and only the creditors of such persons as are given a right of action by the section can maintain an action under it. This is not an action under section 1956, providing for a recovery of the money lost from the winner, for the facts required by that section are not alleged. The question, then, simply is, is a man who, jointly with others, sets up a gaming place, and plays there himself, within the protection of the statute, as against his partners in the enterprise, on the ground that they thereby invited, persuaded, or otherwise induced him to visit the place? The question is not new. In *Brown v. Thompson*, 77 Ky., 538, 29 Am. Rep., 416, the question was presented whether one who was interested in setting up a faro bank, and who lost money to those who bet against the bank, could recover it. It was held he could not recover. The court said: "It is a familiar rule that a case within the letter, but not within the spirit, of a remedial statute, is not embraced by it. The courts will look beyond the letter, to the legislative purpose and intent, and will not, by a blind adherence to the letter, permit a law to become the shelter of those it was

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intended to punish, nor to be used to encourage practices it was made to suppress." It was accordingly held that as the statute was enacted for the protection of the community against gamblers, and not for their protection, one who has set up the faro bank was not within the protection of the statute. This case was followed and approved in *Elias v. Gill*, 92 Ky., 569 (13 R., 798) (18 S. W., 454), where the question was whether one who engaged in the business of selling pools on horse races was within the protection of the statute. The court, after referring to the previous case, said: "And looking to the evil of gaming, suppression of which was the object of the statute, it is obvious that persons who engage in gaming by means of selling pools on horse races are no more within the protection of that statute than those who set up or keep faro banks, for in each case gaming is carried on and made a business." These cases seem to us conclusive of the question before us. It was, no doubt, contemplated by all of the partners that each of them would contribute what he could to the success of the common enterprise. The more gaming was done, the more the take-out, and C. A. Stapp was as much interested in this take-out as anybody else. In playing there he therefore was furthering his own business, which was a felony. Kentucky Statutes, section 1960. It was never intended by the Legislature to give him a right of action against his partners, or them against him, for losses in the business, or to require the court to settle up for them their felonious enterprise. And if he is not given a right of action, then his creditor can not sue, for only the creditor of a person who can sue is given the right of action.

Judgment affirmed.

Whole court sitting.

Petition for rehearing by appellant overruled.

CASE 102—MANDAMUS BY T. P. SATTERWHITE AND OTHERS, AS COMMISSIONERS OF THE CENTRAL KENTUCKY ASYLUM FOR THE INSANE, AGAINST J. G. FURNISH, SUPERINTENDENT OF SAID ASYLUM, TO KEEP THE BUILDING AND FURNITURE INSURED.—FEB. 20.

Furnish v. Satterwhite and Others.

APPEAL FROM JEFFERSON CIRCUIT COURT, CHANCERY DIVISION.

JUDGMENT FOR PLAINTIFFS AND DEFENDANT APPEALS. AFFIRMED.

ASYLUMS—INSURANCE—AUTHORITY TO MAKE—SUPERINTENDENT—CERTIFYING PREMIUMS TO AUDITOR.

Held: 1. Kentucky Statutes, section 224, provides that the boards of commissioners of charitable institutions shall keep the building and furniture insured, and the amount of the premiums to be certified to the State auditor, who shall draw a warrant, etc. Section 230 provides that the steward of each institution, by the direction of the superintendent, shall purchase all needed supplies of every description. Section 233 requires the steward to make monthly reports to the superintendent of his acts, the condition of the farms, and the stock, etc., and in the statutory form for this report are contained items representing certain fixed charges with which the steward has nothing to do, such as "insurance," "pay roll," etc. HELD, that it was the duty of the board of commissioners to contract for insurance for a State insane asylum, and for the superintendent to certify the amount of premiums to the State auditor.

DALLAM & GORDON, ATTORNEYS FOR APPELLANT.

The contention in this case is whether it is the duty of the board of commissioners of the asylum, or of the steward of the institution to make contracts of insurance on the asylum building and furniture.

The appellant contends that it is the duty of the steward and not the commissioners.

The contention of the appellant is based upon the following propositions:

1. Upon the reading of all the sections of the statute pertinent to this question, and which confer the powers and dictate the duties of the board of commissioners, it will be seen that said board is in no case empowered or authorized to contract

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directly, but on the other hand their powers are purely and solely advisory and supervisory.

2. It is the duty of the steward of the institution to purchase and procure all needed supplies for the institution of every description.

3. The item of insurance is one of the needed supplies of the institution.

4. If the board be allowed to purchase the insurance the provisions of section 233 of the statute would have to be absolutely ignored, and it is well settled that "effect must be given to every provision of a statute, except in cases of absolute and irreconcilable incongruity."

5. The intention of the Legislature to vest discretionary power in the steward in all matters of this kind is evidenced by the fact that he is required to give bond for the faithful performance of all his duties. Kentucky Statutes, secs. 219, 223, 224, 225, 230 and 233; *Dazey v. Kellam*, 1 Duv., 403; *Pendleton v. Pendleton*, 6 Bush, 472; *Bird v. Board Comrs.*, &c., 95 Ky., 198.

CARROLL & CARROLL, FOR APPELLEES.

Our contention is that the law in plain unambiguous language makes it the duty of the commissioners to insure the property and buildings of the institution of which they have the general care and management. Section 224, Kentucky Statutes, provides "That the board of commissioners shall keep the buildings and furniture constantly insured, and the amount of premiums on such insurance shall be certified to the auditor by the superintendent, and president of the board of commissioners, and thereupon the auditor shall draw his warrant for the amount upon the State treasurer payable to the superintendent."

The steward is merely the purchasing agent of the institution, charged with the duty of buying needed supplies, subject to the general supervision of the board of commissioners, such as food, clothing, medicine, and things of that sort, and has nothing to do with placing insurance on the property. Insurance is in no sense a "supply" of the institution, and can not be construed as coming under that head any more than purchasing land or building a house.

The whole case in a nutshell is this: Under the terms of section 224, Kentucky Statutes, the commissioners are expressly authorized and directed to place this insurance; and by section 230, the steward is authorized to purchase needed supplies. The two sections relate to entirely different matters and there is no conflict between them.

OPINION OF THE COURT BY JUDGE BARKER—AFFIRMING.

This action was instituted in the Jefferson circuit court, chancery branch, second division, by the appellees, who are the commissioners of Central Kentucky Asylum for the Insane, against the appellant, who is the superintendent of said institution, for the purpose of obtaining a writ of mandamus requiring him to join with the president of the board of commissioners of said institution in certifying to the Auditor of Public Accounts the amount of the premiums due on certain contracts of insurance effected by the board of commissioners upon the buildings and furniture of said institution. The appellees, who were plaintiffs below, in their petition state that in pursuance of section 224 of the Kentucky Statutes they have effected contracts of insurance upon the buildings and furniture of the institution of which they have charge, insuring them against loss by fire; that appellee T. P. Satterwhite, who is president of the board of commissioners of said institution, has certified to the Auditor of Public Accounts of the State of Kentucky the amount of the premiums due on such insurance, but the defendant J. G. Furnish, who is superintendent of said institution, has failed and refused to certify the amount of said premiums to the Auditor; and they further state that because of his failure to certify the amount of said premiums no warrant has been issued by the Auditor in payment of said premiums, and that the certification of the defendant is necessary to secure said warrant, and that, unless said certification is obtained, and said warrant issued, the policies of insurance on the buildings and furniture of said asylum will be canceled, and said property left unprotected from loss by fire. After the filing of this petition, the appellant filed a general demurrer to the same and, without waiving said demurrer, filed his answer, con-

sisting of three paragraphs. The answer of appellant admits that the commissioners had obtained the insurance on the buildings and furniture as set out in the petition, and that he has been requested to certify the amount of the premiums due for same, and has refused so to do. He denies, however, that it is his duty to certify the premiums on insurance effected by the board of commissioners, claiming that it is the duty of the steward of said institution, one Samuel Fulton, under the direction of the appellant, to effect said insurance, and pleads and relies upon the fact that it has been the custom at the said institution for the board of commissioners to authorize the steward to purchase insurance, as well as other supplies, and that on a former occasion, to-wit, the 12th day of January, 1901, the board of commissioners passed a resolution directing said Fulton, the steward of said institution, to purchase insurance of \$50,000, which said Fulton did, and his action was afterward approved by the said board. The learned chancellor below overruled defendant's demurrer to the petition, sustained appellees' demurrer to all the paragraphs of appellant's answer, and awarded, as a final judgment on the pleadings, a writ of mandamus against the appellant as prayed for in the petition, directing and commanding him to certify to the Auditor of Public Accounts the amount of the premiums on the policies of insurance on the buildings and furniture of Central Kentucky Asylum for the Insane, which had been placed by the appellees, as commissioners of said institution.

A writ of mandamus, as defined by section 477 of the Civil Code, is an order of a court of competent and original jurisdiction, commanding an executive or ministerial officer to perform an act or omit to do an act the performance or omission of which is enjoined by law. The appellant is

a ministerial officer of the Commonwealth of Kentucky, having charge of one of its charitable institutions. The question of the correctness of the judgment rendered by the court below depends upon whether or not it was the duty of appellant to make the certification which he admits he has refused to perform. Section 224 of the Kentucky Statutes provides as follows: "The board of commissioners of each institution (charitable institutions) shall keep the buildings and furniture of the institution constantly insured, and the amount of the premiums on such insurance shall be certified to the Auditor by the superintendent, and president of the board of commissioners, and thereupon the Auditor shall draw his warrant for the amount upon the State treasury, payable to the superintendent." It is very difficult to understand how language could be more plain, than does this section, that it is the duty of the board of commissioners of the institution in question to keep the buildings and furniture of the institution insured, and that it is the duty of the appellant to make the certification therein required. Appellant, however, contends that the procurement of the insurance in question is governed by section 230 of the Kentucky Statutes, which is as follows: "The steward of each institution, by direction of the superintendent, shall purchase and furnish to the institution all needed supplies, of every description, and shall consult him as to the character, quantity and quality of all such supplies. They shall be bought where they can be bought cheapest, due regard being paid to quality as well as price. He shall not draw on the treasurer for money to pay for such supplies, in whole or in part, but shall cause itemized accounts of the same to be made, in the name of the sellers, against the institution, setting forth separately the date of purchase and the name and price

of each article purchased, and shall present the accounts, endorsed by the superintendent, to the board of commissioners for allowance; and he shall carefully enter in a book kept for that purpose the number, dates and amounts of warrants issued by the president for the payment of the accounts for supplies purchased by him, and the name of the persons in whose favor they are made." It is seriously contended by appellant that the insurance provided for by section 224 comes under the head of supplies which the steward is required to purchase by the terms of section 230, and the construction thus contended for is thought to be aided by the fact that section 233 requires the steward to make monthly reports to the superintendent of his acts and doings, and the condition of the farms and gardens and the number and character and condition of the stock under his care and control, and that in the statutory form for this monthly report is contained the item, among other things, "insurance." An analysis of section 230 shows that all of the supplies mentioned therein to be purchased by the steward under the direction of the superintendent are such as are to be paid for after the accounts are allowed by the commissioners, out of the treasury of the institution; whereas the premiums for the insurance provided for by section 224 are to be paid by warrant of the auditor upon the State treasury. Nor does the fact that the printed form of the steward's monthly report contains the item "insurance" add any weight to appellant's argument. This report is intended to show the total monthly expenditures of the institution, and as the greater part of this monthly expenditure is made up of items which the steward is required to purchase, as a matter of convenient bookkeeping, it is also required to show certain fixed charges with which the steward has nothing to

do. For instance, the first item on said form is the pay roll, showing the salaries of all the officers and wages of all the employes. It will not be contended that these salaries are supplies to be purchased by the steward, within the meaning of section 230, because with the salaries of the officers and assistants he has nothing whatever to do. They are regulated and provided for by section 240 of the Kentucky Statutes. And yet this item is required to appear in his monthly report, just as the item of insurance is required to appear there. We do not think, however, that it needs any further argument to demonstrate that the learned chancellor below was correct in all the orders and the judgments entered by him in this case.

We freely admit the principle of law so earnestly contended for by counsel for appellant that it is the duty of the court to give force and effect to every provision of a statute, except in cases of absolute and irreconcilable incongruity; and this plain and irreconcilable incongruity would clearly arise if this court should abrogate the plain letter of the law as contained in section 224 by giving the construction contended for by appellant to section 230—a construction not only clearly and unmistakably irreconcilable and incongruous to the plain letter of section 224, but equally irreconcilable and incongruous to the plain letter of section 230. By giving the construction contended for by appellees to the two sections in question, every word in each can be enforced without the slightest incongruity. The fact that the board of commissioners may have heretofore ordered the steward to effect the insurance on the buildings and furniture of their institution, and afterwards ratified his action in the premises, not only does not militate against the construction contended for by

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appellees, but very plainly militates against the construction contended for by appellant. If it had been the duty of the steward to effect insurance under the superintendency of appellant, there would have been no need for any order or request upon the part of appellees for him to perform said duty; and the fact that he took orders from appellees as to his duty concerning the insurance in question at least tends to show that he did not consider it an independent duty on his part to effect the insurance.

As the judgment of the learned chancellor below is entirely in harmony with the views herein expressed, it is hereby affirmed

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CASE 103—NOAH M. REYNOLDS WAS CONVICTED OF MURDER AND HE APPEALS.—FEB. 24.

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APPEAL FROM BELL CIRCUIT COURT.

DEFENDANT CONVICTED OF MURDER AND APPEALS. **AFFIRMED.**

HOMICIDE—SELF DEFENCE—INSTRUCTIONS—EVIDENCE.

- Held: 1. In a prosecution for murder, an instruction that if, at the time defendant killed deceased, he was about to do defendant or his brother some great bodily harm, and that to shoot deceased was necessary, or seemed to defendant to be necessary, in the exercise of reasonable judgment, to protect himself or his brother from such injury, "either real, or to the defendant apparent," the jury should find defendant not guilty, on the ground of self defense and apparent necessity, was not objectionable on the ground that it required the jury to believe that defendant or his brother "really was in imminent danger of great bodily harm at the hands of deceased, instead of being apparently so."
2. An instruction, in a prosecution for murder, on the subject of self-defense, which collects the evidence as to former acts of violence on the part of deceased, and charges that defendant had

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a right to bear arms openly and keep a lookout for decedent, and that, if he casually met him, he need not wait to be assaulted, but may consider the past, and, if he believes that he is in apparent danger of great bodily harm at decedent's hands, he may shoot him, is erroneous, as unnecessarily grouping and emphasizing the facts, and giving undue prominence to particular evidence.

3. *Oder v. Commonwealth*, 80 Ky., 32, 4 R., 18, is overruled so far as it conflicts with the opinion in this case.

J. G. FORRESTER, W. G. COLSON, N. B. SMITH, AND SALYER & BAKER, FOR APPELLANT.

1. We claim that there are numerous errors committed by the trial court to the prejudice of appellant in admitting incompetent evidence and in refusing to admit competent and relevant evidence which we have pointed out in detail in this brief.

2. We insist that the court erred in its instructions given to the jury, and in refusing to give instructions asked by the defendant.

Instruction No. 5 is erroneous and is as follows: "Although the jury may believe from the evidence beyond a reasonable doubt that defendant in Letcher county and before the finding of the indictment in this case, shot and killed deceased, yet, if they believe from the evidence that at the time defendant shot and killed deceased, the deceased was then and there about to do him or the said John Reynolds some great bodily harm, and that to shoot deceased was necessary, &c." We seriously object to this instruction for the reason that it required the jury to decide that the danger actually existed at the time, and does not allow them to pass upon appellant's belief of the existence of said danger.

Instruction 3 is erroneous; it uses the words: "at a time when it was not necessary, and did not seem in the exercise of a reasonable judgment to be necessary."

No. 2 uses the word "apparent" where it should be "reasonably apparent," or "apparently."

These instructions are not skillfully drawn and one contradicts the other.

We also claim that the acting attorney for the Commonwealth in his closing speech to the jury used inflammatory language that was calculated to mislead the jury to the prejudice of the defendant which was objected to at the time.

We claim that the evidence in this case does not show that defendant was on the lookout for deceased at the time of the killing, but that the meeting was casual, and that from the previous conduct and threats of deceased and his actions at the time of the meeting, defendant had reasonable grounds to be-

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lieve that deceased was then armed and about to kill him or his brother, and that by reason of the actual or apparent danger then impending, defendant had the right to shoot in his self-defense.

AUTHORITIES CITED.

Mullins v. Com., 23 R., 2433; Cockrell v. Com., 95 Ky., 22; Com. v. Barnes, 13 R., 163; Oder v. Com., 80 Ky., 36; Redmon v. Com., 21 R., 331; Rhodes v. Com., 21 R., 1070; Gargell v. Com., 12 R., 149; Petty v. Com., 12 R., 919; Howard v. Com., 22 R., 1854; Bohannon v. Com., 8 Bush, 481, and cases cited therein.

M. R. TODD, FOR COMMONWEALTH.

CLIFTON J. PRATT, ATTORNEY GENERAL, OF COUNSEL.

The killing in this case occurred in Letcher county but was tried, by change of venue, in Bell county.

The deceased, Wright, at the time he was killed, was engaged in logging about a mile from his home on Boon Fork. On the morning of the homicide he left his home on horseback to go to the place where he was logging, traveling the usual road to his destination. Appellant resided about one quarter of a mile from deceased. When about a mile from his home, deceased was attacked by defendant and his brother, John Reynolds, and shot off his horse and instantly killed. Three wounds were inflicted on his body, one in the head under the left ear, one on the front part of the head and the other on the left arm. His head was torn to pieces, the evidence showing that the wound was inflicted with a dynamite cartridge, the calibre being 50 by 100. The evidence shows that there were from seven to ten shots fired by defendant and his brother. Directly after the shooting, defendant and his brother, John, were seen by the witness, Bentley and his wife leaving the place where deceased was lying, in a speedy way, both armed with guns. Mrs. Bentley stated that after the first shot was fired she went to her door and saw the Reynolds boys; one of them was standing with his gun down and when he saw her he broke and ran; the other was shooting at deceased. Fuller Bentley went to the place where deceased lay, five minutes after the shooting; no other person had arrived and he states that deceased was lying on his right side and that he did not see any pistol about him. He had on an overcoat, dress coat and vest. After he was taken home a pistol was found under his right arm under his vest in a holster. His vest was buttoned and the pistol was loaded in all the chambers. There was evidence

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showing that there were tracks behind two large stumps and a large rock about thirty yards from the path to the main road where deceased was killed, and that appellant and his brother were located near these stumps and rock, and these tracks were followed in the direction of the home of appellant.

Complaint is made by defendant of the introduction of incompetent testimony by the Commonwealth and the refusal of the court to admit competent testimony offered by defendant, but the court will discover that the defendant was not prejudiced by any error in this respect, if any error was committed.

Complaint is also made as to the instructions given by the court and of the closing argument of the attorney for the Commonwealth, but the court will find that the instructions were substantially correct, and no error was committed that affected the substantial rights of the accused. *Pearce v. Com.*, 10 Rep., 178; *Arnold v. Com.*, 21 Rep., 1566.

OPINION OF THE COURT BY JUDGE BARKER—AFFIRMING.

The appellant, Noah Reynolds, and J. C. Reynolds were jointly indicted by the grand jury of Letcher county, charged with the willful murder of William S. Wright. The case was transferred, by a change of venue, to Bell county. The trial of appellant by a jury in the Bell circuit court resulted in his conviction and his being sentenced to confinement in the penitentiary for the term of his natural life. His motion for a new trial having been overruled, he prosecutes this appeal.

Appellant, by his counsel, urges several objections of small importance, we think, to the court's action in reference to the admission of, and refusal to admit, certain evidence. These various objections have no meritorious foundation, and, after a careful examination, we are not willing to say that the substantial rights of appellant were injured by the court's rulings upon the questions involved.

There are always arising, in a case like this questions of the relevancy and competency of evidence, which lie along the debatable line of the rules of evidence, of which

the trial court can better judge than the Court of Appeals, because often the decisions of these narrow questions are properly influenced by considerations which the lower court sees and understands, but which can not always be fully reproduced in the bill of exceptions. Of such import are all of the questions raised as to the evidence in this case; and, as we have said, we do not think, after a careful weighing of them, that the lower court's rulings were erroneous.

Appellant complains of instruction No. 5, which relates to the right of self-defense. His objection is that it required the jury to believe that, at the time of the shooting, appellant or J. C. Reynolds really was in imminent danger of great bodily harm at the hands of William S. Wright, instead of being apparently so; and he cites, in support of this objection, the cases of Cockrill v. Commonwealth, 95 Ky., 23, 15 R., 328, 23 S. W., 659. The instruction under discussion is very readily distinguished from that involved in the case cited. Instruction No. 5, if it contained only the language which appellant's counsel quote in their brief, would be inimical to the principle of the Cockrill case; but, if all the instruction is considered, every substantial right of self-defense to which appellant was entitled is found to be carefully preserved. Said instruction is as follows: "Although the jury may believe from the evidence, beyond a reasonable doubt, that the defendant, in Letcher county, and before the finding of the indictment in this case, shot and killed deceased, yet if they believe from the evidence that at the time defendant shot and killed deceased the deceased was then and there about to do him or the said John Reynolds some great bodily harm, and that to shoot deceased was necessary, or seemed to the defendant to be necessary, in the

Reynolds v. Commonwealth.

exercise of a reasonable judgment, to protect himself or John Reynolds from such injury, either real, or to the defendant apparent, you will find the defendant not guilty, on the grounds of self-defense and apparent necessity." It will be observed that this instruction required the jury to acquit the defendant if they believed from the evidence that, at the time defendant shot and killed deceased, the deceased was then and there about to do him or the said John C. Reynolds some great bodily harm, and that to shoot deceased was necessary, or seemed to the defendant to be necessary, in the exercise of reasonable judgment, to protect himself or the said John C. Reynolds, from injury, "either real, or to the defendant apparent;" and this was all to which appellant was entitled. It may be that this instruction is not drawn as artistically as the learned counsel for appellant would have written it, but, as a whole, it protects every right of self-defense which the law awards to one standing in the position of appellant.

Appellant also complains that, under the evidence in this case, he was entitled to the instruction authorized by the case of *Oder v. Commonwealth*, 80 Ky., 32, 4 R., 18. We freely admit that there was evidence in this case to have warranted the court in giving the instruction authorized in the case cited, if the principles enunciated therein can be upheld either in reason or on authority. The instruction in the case of *Oder v. Commonwealth* is as follows: "If the jury shall believe from all the evidence that, previous to the time of the killing, the deceased, Volney Hall, lay in wait for the defendant, and menaced and threatened to kill him, and attempted violence upon his person with a deadly weapon, or did any or either of them, then he had the right to consider the same in determining whether he was in danger of losing his life or of suffer-

ing great bodily harm at the hands of Hall whenever with or near him. These alone will not excuse the killing; but the defendant had the right to bear arms openly, and, when he met the deceased, if, from such lying in wait, threats, menaces and attempted violence, if any, and from the circumstances attending the meeting, or if, from the circumstances attending the meeting alone, he in good faith believed, and had reasonable grounds to believe, that he was then and there in danger of losing his life or of suffering great bodily harm at the hands of the deceased, then he was not obliged to wait until he was actually assaulted, but he had the right to use such means as were at hand, and as were necessary, or apparently necessary, to protect himself from such immediate danger; and, if, in doing so, he shot and killed deceased, he is excusable on the ground of self-defense, and should be acquitted, unless the jury shall believe from all the evidence, beyond a reasonable doubt, that at the time of the killing the defendant sought the deceased with the intention and for the purpose of killing him, in which case he is not entitled to an acquittal on the ground of self-defense." This instruction, the court said, did not sufficiently protect the defendant, because by its terms he was excluded from considering the menace, lying in wait, and threats unless the jury believed from all the evidence that this actually occurred, whereas, in law, the defendant had a right to act upon them, whether they actually occurred or not, provided he in good faith believed, and had reasonable ground to believe, from the circumstances as they appeared to him, that the deceased had waylaid and threatened him. The question, said the court, is not whether the jury believed the deceased threatened and waylaid the defendant, but whether the defendant believed, and had reasonable ground to believe, he

had done so, and the jury should have been so instructed, and allowed to decide. Said the court: "The maintenance of self-defense in a court of justice, under such a state of facts as exhibited by this record, requires, upon the part of the court, the utmost care, so that the accused may not be deprived of its right, upon the one hand, and assassination excused, on the other. After a careful review of the authorities on the subject, we declare the law to be this: That when a person has been merely threatened, by even the most lawless character, it furnishes no legal excuse for taking his life. But when a person has been threatened, waylaid, menaced, and assaulted with a deadly weapon, and he afterwards casually meets his foe, if, from his character, antecedent conduct, and the circumstances of the meeting, and his presence, he believes, and has reasonable grounds to believe, judging thereof for himself, but at his peril, that his foe is about to inflict upon him loss of life or great bodily harm, or will then and there carry into execution his design to kill him or do him such harm, unless prevented, he is not bound to wait until actually assaulted, but he may lawfully use such force as shall be necessary to avert such impending danger; but it is always a question for the jury to judge of the reasonableness of the apprehended danger, and the unfeigned belief of its existence by the person imperiled by it. And in this connection, in view of the qualification added to the instruction quoted, it is necessary to determine the rights of the accused under an opposite tendency of the evidence from that contemplated by the qualification. It must be recorded as a right, to which all citizens are entitled, that the accused 'may leave his home for the transaction of his legitimate business, or for any lawful or proper purpose,' and while so engaged, having reasonable grounds to be-

lieve, and in good faith believing, that he had been threatened, waylaid and assaulted with a deadly weapon, he had the right to carry arms openly, and keep a lookout for his enemy, or procure information of his movements in good faith, and alone for the purpose of guarding himself from surprise or being taken unawares; and if, under such circumstances, a meeting casually occurs, then the law of self-defense applies in the same manner, under similar circumstances as indicated where the meeting is casual, and without precaution against surprise, further than being armed for the purpose of self-protection; but in no state of case is one person allowed by law to hunt down or seek another for the purpose of killing him, and in pursuance of such an intention, accompanied by such an act, take his life; hence if the defendant sought the deceased with the intention of killing him, or purposely brought about the meeting between them, or made his presence a mere pretext for slaying him, he can not rely upon the law of self-defense to excuse his act, although he may have believed that he had been threatened, waylaid, and assaulted by the deceased, who would at some future time execute his design. It will be seen, from this view of the law, that the instruction was erroneous in two aspects: First, in making the right of appellant to rely upon the threats and waylaying of him by deceased dependent on the establishment of their existence to the satisfaction of the jury by the evidence; second, in not informing the jury, in connection with the qualification, that the accused had the right to keep a lookout for the deceased, or procure information of his movements, for the sole purpose of avoiding a surprise."

We freely agree with the language of the court in this case, in so far as it asserts that, in giving the instruction

authorized by the reasoning of the opinion, there is great danger that assassination may be excused. This court has, time and again, decided that it is error to unnecessarily group together facts, or supposed facts, established by the evidence, and to place them in the form of an instruction to the jury, thus unnecessarily emphasizing these facts, and giving them undue prominence in the estimation of the jury in reaching a verdict. The instruction authorized by the case cited is peculiarly inimical to this principle. It gathers up all the testimony as to former threats or attempted violence on the part of the deceased, together with the truisms that the defendant had the right to bear arms openly; to go about his ordinary business; that he might keep a lookout for his enemy; and then it adds that, if he casually meets him, he need not wait to be assaulted, but may consider all of the past, and if he believes that he is in apparent danger of great bodily harm at the hands of his enemy, he may shoot him down. We believe that, as a practical detail, the giving of the instruction authorized by the case of *Oder v. Commonwealth* is accepted by the average jury as meaning that, if one has been threatened or been assaulted in the past, when he meets his foe afterwards he may, without more ado, assassinate him. The principle enunciated is unsound, by every canon of the criminal law, and is unwarranted by any authority with which we are acquainted. All of the facts which the opinion authorizes to be placed in the instruction on self-defense are competent as evidence, to be weighed by the jury, in connection with all the other testimony adduced on the trial, in considering the defendant's plea of self-defense; but they have no place in this instruction, and, when placed there, are, as a rule, considered by the jury as warranting one in assassinating the enemy, who

may have previously threatened to do him violence. In so far as the case of *Oder v. Commonwealth* is inimical to the principle here laid down, it is overruled.

Appellant further complains of the closing speech of the Commonwealth's attorney. We have examined this speech carefully, and we do not believe that it contains anything which would warrant us in reversing this case. Some of the statements are exaggerated; some of the conclusions are overdrawn; but there is some evidence tending to support every statement made; and while the speech in question is florid in style, and quite zealous in seeking a conviction of appellant, on the whole we can not say it is substantially out of the line usually adopted by the Commonwealth's attorneys in criminal cases.

The evidence fully warranted the conclusion the jury reached. The killing of William S. Wright by appellant and his brother, John C. Reynolds, was admitted. The theory of appellant, that William S. Wright rode up behind him and his brother, who were walking along the road, each with a Winchester rifle in his hand, and that the deceased, seeing them thus armed, himself on horseback, with his pistol in a holster under his vest, attracted their attention by calling them vile names and telling them he was going to kill them—attacked them, under these circumstances, without first drawing his pistol—is a proposition which staggers even credulity itself. Every man of any experience is bound to know that it is exceedingly difficult, while mounted upon a restive horse, to use a pistol with any degree of accuracy; and for one mounted on a horse thus to attack two men on foot, each armed with a repeating Winchester rifle, would be, practically, to commit suicide. The jury heard this story of appellant, and they

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rejected it as untrue. They believed from all the evidence in this case that appellant and his brother assassinated William S. Wright in cold blood.

For these reasons the judgment is affirmed.

CASE 104—PROCEEDINGS BY A. W. WALL AND OTHERS TO PROBATE THE WILL OF ELIZABETH A. WALL, DECEASED, IN WHICH LYDIA E. DIMMITT AND OTHERS CONTEST THE VALIDITY OF THE WILL.—
FEB. 24.

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114	923
138	786

APPEAL FROM MASON CIRCUIT COURT.

JUDGMENT FOR CONTESTANTS AND PROPOUNDERS APPEAL. REVERSED.

WILLS—UNDUE INFLUENCE—EVIDENCE—DECLARATIONS OF DEVISEE—
PRACTICE.

- Held: 1. Statements or declarations of a testator, whether made before or after the execution of the will, are not competent as direct evidence of undue influence, but are only admissible to show the mental condition of the testator at the time of making the will, and his susceptibility to the influences by which he was surrounded at the time.
2. In a will contest by heirs who alleged that the will was procured by the undue influence of testatrix's husband, evidence that the husband had stated that he would see that contestants received no part of the wife's estate was admissible.
3. Where a finding that a will was procured by undue influence was found on appeal to be unsupported by the evidence, but it was also decided that certain evidence which might have formed a basis for the finding was erroneously excluded, the case can not be remanded with an order to probate the will, but must be remanded for a new trial.
4. Where a husband was a beneficiary under his wife's will, the fact that, as tenant by curtesy, he would have taken the same interest he took as devisee, did not render his declarations bearing on the question of undue influence inadmissible as against his co-devisees.

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5. In a will contest by a disinherited heir of testatrix, in which it was alleged that testatrix's husband exercised undue influence to procure the will, questions to the husband as to whether he had ever said to his wife that one of the contesting heirs was a spendthrift, who would dissipate the property, and for her to see that the matter was fixed in such a way that he could not get any part of it, were improperly excluded.

E. L. WORTHINGTON, FOR APPELLANT.

GARRETT S. WALL AND LEWIS APPERSON, OF COUNSEL.

POINTS AND AUTHORITIES.

1. No presumption of undue influence arises from the fact that the draftsmen of a will or his family, is a beneficiary under the will. Notes to *In re Hess's Will*, 31 Am. St. Rep., 683; 1 Underhill on Wills, sec. 137; 1 Jarman on Wills, Bigelow's note, 66.

2. The fact that a testator by his will gives more to some of his children than to others is no evidence that it was procured by undue influence. *Zimlich v. Zimlich*, 90 Ky., 657; *Hoerth v. Zable*, 92 Ky., 202.

3. Declarations of testator whether made before or after the making of a will, are not competent to show undue influence. 1 Jones on Evidence, secs. 492-493; 2 Wharton on Evidence, sec. 1010; Notes to *in re Hess's Will*, 31 Am. St. Rep., 690; 1 Jarman on Wills, Bigelow's note, 71; 1 Underhill on Wills, sec. 161; 1 Williams on Executor, 64 note; *Goodbar v. Lidikey*, 43 Am. St. Rep., 301; *Milton v. Hunter*, 13 Bush, 168; *Lucas v. Cannon*, 13 Bush, 650.

4. Husband and wife have a right to influence each other in the making of their wills. *Schouler on Wills*, sec. 236; *Page on Wills*, sec. 410; *Secrest v. Edward*, 4 Met., 174; *Broaddus v. Broaddus*, 10 Bush., 303; *Turley v. Johnson*, 1 Bush, 116.

5. When influence is exerted from disinterested motives no inference can arise that it was an improper influence. *Harrison's Will*, 1 B. Mon., 351.

6. The declarations of a devisee are admissible to prove undue influence only when they amount to an admission against his interest. 1 Underhill on Wills, sec. 163; 1 Jarman on Wills, Bigelow's note, 71; *Beall v. Cunningham*, 1 B. Mon., 399; *Rogers v. Rogers*, 2 B. Mon., 324; *Milton v. Hunter*, 13 Bush, 167.

7. The fact that a testator keeps secret the contents of his will is no evidence that it was procured by undue influence. 1 Underhill on Wills, sec. 131.

8. Opportunity to exert undue influence is no proof that it was actually exerted. 1 Underhill on Wills, sec., 130.

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9. To sustain a charge of undue influence two things must be proved, that the influence was exerted and that it was effectual. Schouler on Wills, sec. 242; 1 Underhill on Wills, sec. 126

10. Where there is no evidence of undue influence or want of testamentary capacity, this court will reverse the case with direction to order the will probated. Bush v. Lisle, 89 Ky., 393. Broadbuss v. Broadbuss, 10 Bush, 299; Sanders v. Blakeley, 21 Ky. Law Rep., 1321.

ADDITIONAL AUTHORITIES CITED BY GARRETT S. WALL AND LEWIS APERSON.

16 Am. Dec., 253 and Note, 1 B. Mon., 351; 3 Wharton, 129; 70 New York, 387; 1 Redfield on Wills, 522 and Note 32; 2 Mar., 225, 4 Mon., 239, 1 Bibb, 611, 2 Bibb, 311; 6 Mon., 136, 6 B. Mon., 341; Hardin, 549; 5 Dana, 8, 7 Bush, 203; Trost v. Dingler; 10 Central Law Reports, 118 Pa., 259; 116 Pa., 612; 4 L. R. A., 738, 1 L. R. A., 161, Elkinton v. Brick; 13 Central Rep., 383, L. R. A., vol. 8, p. 261 and notes; 3 Am. Dec., 390, 25 Am. Dec., 167, 20 Am. Dec., 100; 62 Am. Dec., 71 and notes, 93 Am. Dec., 624 and 691; 13 Bush, 163, 10 Bush, 299; Bush v. Lisle, 89 Ky.; 393, 90 Ky., 28; 82 Ky., 92; 81 Ky., 15; 10 Bush, 304 and 552; 4 Met., 174; 13 Bush, 163; 1 Bush, 116, 2 J. J. Mar., 64, 4 B. Mon., 12; Sec. 606, Civil Code, Alexander's Exrs. v. Alford, &c., 89 Ky., 105; Commonwealth v. Sapp, 90 Ky., 580.

SALLEE & SALLEE, FOR APPELLEES.

POINTS AND AUTHORITIES.

1. The same effect shall be given the verdict in a will case as is given in other civil cases. Kentucky Statutes, sec. 4850.

2. The verdict must be tested by the instructions. It is not contrary to law if justified by the instructions. Kelly v. Davis, 9 Ky. Law Rep., 647.

3. The assignment of error that the verdict is not sustained by the evidence presents the single question whether there is any evidence to support it. Jones v. Woche, Richie and Hanford, 90 Ky., 232; Chism v. Barnes, 20 Ky. Law Rep., 569.

4. A new trial ought not to be granted merely because a higher court would have decided otherwise on the facts. L. & N. R. Co. v. Connelly, 9 Ky. Law Rep., 993; Smith v. Crow, 21 Ky. Law Rep., 222.

5. Where the evidence is in conflict this court will not set the verdict aside on the ground that it is against the weight of the evidence. Stroud v. Simpson & Co., 16 Ky. Law Rep., 318; Ohio

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Ry. Co. v. Alves, 11 Ky. Law Rep., 811; Carlin v. Baird, 11 Ky. Law Rep., 934.

6. The verdict may seem to be against the weight of the evidence. The proof may preponderate in favor of the will. Yet unless the verdict is so palpably against the weight of the evidence as to indicate passion or prejudice, this court will not set it aside on that ground. Newcomb v. Newcomb, 96 Ky., 120; Lischy v. Schrader, 20 Ky. Law Rep., 846.

7. Declarations of one devisee to another devisee concerning the execution of the will in contest are relevant and competent when tending to show undue influence. 1 Jones on Evidence, sec. 237; 1 Greenleaf on Evidence, sec. 169; Beall v. Cunningham, 1 B. Mon., 399; Milton v. Hunter, 166; Cave v. Cave, 13 Bush, 452; Wilson v. Hays, 22 Ky. Law Rep., 897; Grove v. Grove, 13 Ky. Law Rep., 807; Porschet v. Porschet, 82 Ky., 102; Wharton on Evidence, vol. 1, sec. 21; Fee v. Taylor, 83 Ky., 264; Mason v. Bruner, 10 Ky. Law Rep., 155; Mercer v. King, 13 Ky. Law Rep., 429.

8. Kentucky courts have held steadfastly to the rule that heirs, devisees and all parties interested in sustaining or rejecting a will are in a contest over its probate competent to testify the same as other witnesses in other civil cases. Williams v. Williams, 90 Ky., 35; Phillips v. Phillips, 81 Ky., 328; Flood v. Pragoff, 79 Ky., 614; Cave v. Cave, 13 Bush, 452; Milton v. Hunter, 13 Bush, 163; King v. King, 19 Ky. Law Rep., 869.

9. Proof of execution and contents of a former will and conversations with testatrix, afford evidence of her fixed purposes and illustrate her cherished intentions with respect to her property. Barlow v. Waters, 16 Ky. Law Rep., 426; Powers v. Powers, 21 Ky. Law Rep., 597; Muller v. Muller, 22 Ky. Law Rep., 207; Carlin v. Baird, 934.

10. Declarations of the testatrix are relevant and competent to show her susceptibility to surrounding influences. Lucas v. Cannon, 13 Bush, 563; Shropshire v. Reno, 5 J. J. Mar., 91; Harrell v. Harrell, 1 Duvall, 205.

11. Any evidence of testatrix's conduct or conversation tending to show her feelings towards her daughter or previous intentions in respect to the disposition of her estate are relevant and competent. Randolph v. Lampkin, 90 Ky., 556; Williams v. Williams, 90 Ky., 35; Fry v. Jones, 95 Ky., 151; Turner v. King, 98 Ky., 253; Johnson v. Stivers, 95 Ky., 128; Fuller v. Fuller, 83 Ky., 351.

12. A peremptory instruction is never proper when there is any evidence conducing to establish the truth of plaintiff's contention. 23 Ky. Law Rep., 121; 97 Ky., 53; 93 Ky., 343; Hud-

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son v. Adams, 20 Ky. Law Rep., 1267; Thompson v. Thompson, 17 B. Mon., 22.

13. There was no error in the court refusing to modify instruction No. 2. It would have been error to modify same as requested which would have confined the jury to believe testatrix was acting under the undue influence of one or two of the propounders and no other person or persons. Dean v. Phillips, 22 Ky. Law Rep., 1622; Wise v. Foote, 81 Ky., 15; Morris v. Morton, 14 Ky. Law Rep., 363.

14. The court is not bound upon its own motion to instruct on the entire law of the case. Propounders must ask for instructions before they can complain that certain instructions were not given. Turner v. King, 98 Ky., 253; Underhill v. Underhill, 16 Ky. Law Rep., 718; Adams Express Co. v. Singleton, 7 Ky. Law Rep., 296.

15. To invalidate a will it is not necessary for the undue influence to be exerted at very time of execution. It is sufficient that a controlling influence previously put in motion is still controlling to the extent of destroying free agency. Overall v. Bland, 11 Ky. Law Rep., 371.

16. Undue influence is nearly always difficult of proof but the jury may infer its existence from circumstantial evidence. Lischy v. Schrader, 20 Ky. Law Rep., 846; Randolph v. Lampkin, 90 Ky., 557.

17. Gross inequality of distribution between children, in connection with other evidence of undue influence, is a proper matter of consideration for the jury, in a question of undue influence. Zimlich v. Zimlich, 90 Ky., 661; Sherley v. Sherley, 81 Ky., 247; Bledsoe v. Bledsoe, 8 Ky. Law Rep., 55.

18. The secrecy enveloping this will; the draftsman and testatrix residing in the same house and the excessive advantages gotten by him and children under the will; strike the mind as being wrong and require the propounders to show that the testatrix had volition and capacity. Flood v. Pragoff, 79 Ky., 612.

19. The detection of undue influence is a question peculiarly for the jury, and this court should not disturb their finding upon any mere semblance of error occurring during the trial. Smith v. Crow, 21 Ky. Law Rep., 222; Fry v. Jones, 95 Ky., 148.

OPINION OF THE COURT BY CHIEF JUSTICE BURNAM—REVERSING.

This is an appeal from a judgment of the Mason circuit court, rendered pursuant to a verdict of a jury, refusing to probate as the last will of Elizabeth A. Wall a testamentary paper duly executed by her on October 31, 1896.

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The will was assailed in the court below on the ground that it was procured by the undue influence of the husband and son of testatrix. Mrs. Wall was at the date of its execution 80 years of age, and her husband was then 88 years old. She died about 18 months later, leaving surviving her, as her heirs at law, her husband, Dr. A. H. Wall; her daughters, Mrs. Lydia E. Dimmitt, who had one child, and Mrs. Mary W. Apperson, who had two children; and a son, Garrett S. Wall, who had three children. Her entire estate consisted of a tract of about 450 acres of very valuable land, conceded to be worth in the neighborhood of about \$100 an acre. Prior to the making of the will, testatrix and her husband had advanced to each of their children about \$18,000. For many years prior to her death her son, G. S. Wall, and his family, had lived with testatrix in her residence in Maysville, Ky. Her relations with each of her children were most cordial, frank and affectionate. In the latter part of the year 1891, Mrs. Wall made a will by which she gave one-third of her 450 acres of land to her son in fee, one-third to Mrs. Apperson in fee, and the remaining third to Mrs. Dimmitt for life, with remainder to her son Hal Dimmitt, and, in case he died without children, then to revert to Garrett Wall and Mary W. Apperson and their children. Hal Dimmitt was at that time, and so continued, a married man, with one child. The will of 1891 was retained by Garrett S. Wall, and was in his custody until two days before the making of the will of October 31, 1896. In the will of 1896, testatrix changed the devise to her daughter, Mrs. Lydia E. Dimmitt, so as to give to Mrs. Dimmitt one-third of the 450 acres for life, and then provided that at her death her executor, named in the will, should sell and convey this tract of land to the highest bidder, and divide the proceeds equally between

her six grandchildren, share and share alike. It appears from the testimony that the provisions of the first will were well known by all the family of the deceased, but that the existence of the second will was not known to Mrs. Dimmitt until after the death of her mother, although she testifies that their relations continued to be of the most affectionate character, and that she assisted in nursing her for several weeks immediately preceding her death. Mrs. Dimmitt testified upon the trial before the jury: That, a short time before the execution of the will of 1891, her mother said to her that her father desired her to make a will, and to leave to her only a life estate in one-third of the land, and that at her death it should go to her brother and sister, to which she objected, and that her mother replied that it would be unjust, and she would not make such a will, but would make a will giving the land to witness and her son Hal Dimmitt during their lives, and at the death of both to her grandson, son of Hal Dimmitt. That subsequently she frequently talked with her mother about this will, and was assured by her that the will had been written as she promised. That she never heard of the execution of the last will until some time after the death of her mother, when she wrote to her brother concerning the probate of the first will. That, in response to this letter, Garrett Wall, for the first time, informed her by letter of the will of 1896, in which he assured her that he had nothing to do with it, except to write it. By the same mail, Mrs. Dimmitt received the following letter from her father: "Maysville, Ky., May 7, 1898. My dear daughter: I have read the letter to your brother. I will now answer it. I do know what she did in the provision of the land was after many weeks' reflection, all caused by your prodigal son, who you can not trust with

money or anything he can sell to bring money. You have one-third interest during life or its income. As to the Dr.'s thinking it a reflection on him, I have no idea it ever entered her mind. As she certainly had the highest regard and love for him. I am interested in her will and will certainly have it probated. We each had a will, and had I died first every thing was left to her and vice versa. I will be disappointed if she hasn't left everything to me. I have done through life what I thought due to my children and shall die so. I am going to do the best I can for you all whilst I live and try to part in peace. Much Love affectionately your father Alex H. Wall." That after the reception of this letter she went to see her father, and he began the conversation by saying: "Daughter, you can not break your mother's will; it is no use trying; and don't reproach your brother. I am the one to blame. Blame me with the whole thing." She also testified that her father had a very strong will, and that her mother was gentle and yielding, and had always been delicate, and during the last two or three years of her life had failed perceptibly. G. S. Wall testified that he had written both wills at the instance of his mother, and had always retained them in his possession; that, when he prepared the last will, his mother, after giving Mrs. Dimmitt a life estate in one-third the land, directed that at her death it should be sold, and one-half the proceeds should go to Mrs. Apperson's children, and one-half to his children, but that at his suggestion his mother changed and directed that the land should be sold, and the proceeds divided equally among her six grandchildren, so that his children would get three-sixths, Mrs. Apperson's two-sixths and Hal Dimmitt one-sixth. This was substantially the only testimony which was admitted upon the trial which

tends, even under the contention of appellee, to establish undue influence in the procurement of the will.

The law is well settled in this State, and is abundantly supported by the text-writers and decisions of other States, that the statements or declarations of a testator, whether made before or after the execution of the will, are not competent as direct and substantive evidence of undue influence, or to show that the will was procured thereby, but are admissible to show the mental condition of testator at the time of the making of the will, and her susceptibility to influences by which she was surrounded at the time. See Jones on Evidence, secs. 492-493; Wharton on Evidence, sec. 1010; notes to *in re Hess' Will* (Minn.), 51 N. W., 614, 31 Am. St. Rep., 690; Bigelow's notes to Jarman on Wills, 71; Underhill on Wills, sec. 161; Williams on Executors (1st Ed.), 64; *Goodbar v. Lidikey* (Ind. Sup.), 35 N. E., 691, 43 Am. St. Rep., 301; *Milton v. Hunter*, 76 Ky., 163. And when we eliminate the declarations of testatrix, testified to by Mrs. Dimmitt, there is very little evidence left in the record bearing upon the question of undue influence—certainly not sufficient to authorize the conclusion that the will was the result thereof. We are therefore of the opinion that the verdict, upon the case as presented in the record, is palpably against the weight of evidence, and for this reason the judgment must be reversed. But in view of the fact that the trial court excluded from the consideration of the jury the testimony of Dr. Alex Hunter, Con Guilfoile and William C. Johnson as to the declarations made to them by Dr. A. H. Wall, to the effect that he would see that his grandson Hal Dimmitt received no part of the Wall estate, and which, in our opinion, was entirely competent, and would have fur-

nished some basis for the verdict of the jury, if it had been admitted, we would not be justified, therefore, in remanding the case with an order to probate the will. In *Broaddus' Devisees v. Broaddus' Heirs*, 73 Ky., 299, it was held that the General Statutes required that this court should, on appeal, give the same effect to the verdict of the jury in a will case as is given in other civil cases, and repealed that part of section 519 of the Civil Code of Practice which provides that the court of appeals should in such cases try both the law and facts, and that a new trial would be awarded on the reversal of a will case, except in those cases where there was no evidence to sustain the verdict. In that case it was held that there was no evidence, and the will was ordered to probate. And it has been followed in two or three instances where the court found that there was no evidence to sustain the verdict. But ordinarily the same rule of practice obtains in will cases as in other jury trials. And this case will have to go back for a new trial before a jury, and we are of the opinion that it was competent for contestants to prove acts and declarations of Dr. Wall which tended to support their contention that he had unduly influenced his wife in the execution of the will. He is a beneficiary under the will, and was active in its probate, and the appeals from the judgment of the trial court is prosecuted in his name. The fact that, as a tenant by curtesy, he would have taken substantially the same interest in the estate of his wife as came to him as devisee under the will, can not change the well-established rule in this State that admissions and declarations of a legatee or devisee under a will are competent not only against himself, but also as to the interest of his co-legatees or devisees thereunder. This question was fully considered

by this court in *Beall v. Cunningham*, 40 Ky., 399, *Rogers v. Rogers*, 41 Ky., 324, and in *Milton v. Hunter, etc.*, 76 Ky., 163; and in the very recent case of *Gibson, etc., v. Sutton, etc.*, 24 R., 868, 70 S. W., 188, this court said: "We do not feel at liberty at this late day to disregard decisions which have been generally acquiesced in by the profession as sound, because not in accord with the rule of other States."

The trial court also erred in sustaining an objection to the following questions which were propounded to the appellant Dr. A. H. Wall by contestants: "Q. Did you ever say to your wife that Hal was misbehaving in such a way?" "Q. Did you ever say anything to your wife about his being a spendthrift, and that he would spend the property or dissipate it, and for her to see the matter was fixed in such a way that he would not in any contingency get any part of her property?"

For reasons indicated, the judgment is reversed, and cause remanded for a new trial not inconsistent with this opinion.

Cadiz Railroad Company v. Roach.

CASE 105—ACTION BY C. J. ROACH AGAINST CADIZ RAILROAD COMPANY TO CANCEL A WRITING DONATING LAND TO SAID RAILROAD COMPANY.—FEB. 2^d

Cadiz Railroad Co. v. Roach.

APPEAL FROM TRIGG CIRCUIT COURT.

JUDGMENT FOR PLAINTIFF AND DEFENDANT APPEALS. REVERSED.

RAILROADS—RIGHT OF WAY—DONATION TO RAILROAD—CONSIDERATION—ESTOPPEL.

- Held: 1. Where plaintiff, with a number of other landowners, agreed to donate land as a railroad right of way, and it appeared that it was three miles and a half from his residence to the nearest depot, and that the building of the new railroad would provide a depot within a mile and a half, the necessary increase in the value of plaintiff's land was a sufficient consideration for his agreement.
2. Where a landowner agreed to donate land to a railroad company for a right of way, and thereafter the railroad commenced work upon its road, and graded the roadbed to a point near the grantor's land, who, then, for the first time, repudiated his grant, he was estopped from denying the obligation of his agreement on the ground that it was without consideration.
3. The partial building of a railroad in reliance on a promise to donate a right of way was a sufficient detriment to the promisee to constitute a good consideration for the promise.

SIMS & THOMAS, ATTORNEYS FOR APPELLANT.

It appears from the uncontroverted allegations of the answer to plaintiff's petition that numerous citizens of Cadiz and vicinity organized a company known as the Cadiz Railroad Company for the construction of a line of railway from Cadiz, Ky., to Gracey, by private subscription, and that appellee, with others, donated the right of way, to the company over their lands to aid in this reciprocal enterprise.

The appellee donated the right of way over his land by a writing as follows:

"Cadiz, Ky., Feb. 21, 1901. I hereby donate to the Cadiz Railroad Company, a sixty foot right of way through my farm according to survey.

C. J. Roach."

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Of the many who contributed the right of way appellee alone seeks, in a court of equity, to avoid his contract.

In his original petition he pleads that his signature was obtained by gross misrepresentation and fraud, but finding he could not sustain this plea, he, by an amended petition, pleads "no consideration."

We maintain that this plea can not be upheld for several reasons:

1. Because "he who seeks equity must do equity." This rule is correct in principle and in morals, else the world would be victimized by pretenders in all branches of business in life.

2. Another rule touching the law of contract is this, in substance: "Any advantage to promisor or prejudice to promisee," is sufficient consideration to uphold the contract.

3. Another rule is that "whenever several promise to contribute to a common object, desired by all, the promise by each is a good consideration for the promise of the others."

4. And still another rule is, that, "An obligation executed for a donation to any lawful or beneficial object or enterprise is binding when there are agents or trustees authorized to receive or dedicate the donation to the purpose intended."

The appellee made no complaint or objection to the road until the right of way had been cleared off by the railroad crew along the line and graded for about seven miles from Cadiz out near to appellee's land at an expense of \$15,000 or \$20,000, when he filed his suit and stopped the work.

For these reasons and others not mentioned we ask a reversal of the judgment appealed from.

AUTHORITIES CITED.

Stapp v. Anderson, 1 Marshall, 538; Overstreet v. Phillips, 1 Littell, 121; Rudd v. Hanna, 4 Monroe, 532; Harrod v. Black, 1 Duv., 181; Twin Creek, & C. T. P. R. Co. v. Lancaster, 79 Ky., 552; Collier v. Baptist E. Society, 8 B. M., 68; Trustees Ky. F. O. School v. Fleming, 10 Bush, 238.

KELLY & SON AND D. P. SMITH, FOR APPELLEE.

The questions to be considered in this case are:

1. Was the contract obtained by fraud?

2. Was there any consideration for the contract?

3. Right of way being a gift, was possession ever delivered?

Appellee was not one of a number of persons contributing to a common enterprise for mutual benefit, but as an outsider he promised a donation to the company after it was formed. The company could not have relied on the donation of right of way by appellee in the sense that it was in any way induced thereby

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to begin the construction of its road, for the reason that it had been formed independently of the right of way and to carry out the purpose for which it was organized it had to purchase the right of way if it was not given. This, every stockholder and incorporator knew from the beginning. Appellee got no stock in the company, and therefore was not on a common level with other contributors and to receive mutual benefit with them.

Possession of the land was never given by appellee, except after suit was filed it was agreed by the parties that the road should be built on said land without either party waiving any rights in the premises. *Twin Creek & C. Turnpike Co. v. Renaker*, 3 Rep., 368; *Henry Banks v. John Mays' Heirs, &c.*, 1 Marshall, 435.

OPINION OF THE COURT BY JUDGE SETTLE—REVERSING.

The appellant railroad company undertook to construct and operate a railroad between Cadiz and Gracey, in Trigg county, Ky., for which purpose it received subscriptions in money and donations of right of way over the lands of divers citizens of that county. The appellee, C. J. Roach, gave such right of way over his land, evidenced by the following writing, signed by him and one L. A. Miller, who had likewise given appellant the right of way over his land: "Office of Cadiz Railroad Company. Cadiz, Ky., Feb'y. 21st, 1901. I hereby donate to the Cadiz Railroad Company a 60-foot right of way through my farm, according to surveys. L. A. Miller, C. J. Roach." It appears from the record that the route for the railroad had previously been surveyed through appellee's land, and marked by stakes. After the execution of the writing mentioned, appellant began the work of constructing its road; and, while engaged in cutting and removing timber and undergrowth from the right of way through appellee's land, the latter met the foreman in charge of appellant's workmen, and forbade the doing of any further work on his land, and soon thereafter instituted this action to obtain a cancellation of the writing whereby appellant had been granted the right of way

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over his land, upon the alleged ground that it had been procured by fraud. The original petition avers, in substance, that appellee was induced to execute the writing upon the false representation made by appellant's agents at the time that all of the neighbors had donated to appellant the right of way over their lands for its road, and in fact that the right of way had been donated from Cadiz to appellee's farm. It is further averred that this statement was false, but that he, being unaware of its falsity, was induced thereby to execute the writing, which he would not otherwise have done. Afterwards an amended petition was filed, in which it was alleged that the writing in question was and is without consideration, and consequently void. The answer of appellant specifically denies the allegations of fraud and want of consideration contained in the petition as amended, and avers that the work of building its line of railroad was undertaken by the citizens of Trigg county upon subscriptions of money and donations of lands for the right of way, that appellee's grant of the right of way over his land was made pursuant to this undertaking, and that appellant, relying upon these subscriptions and donations, including that of appellee, had commenced the construction of its line of railroad, and proceeded with the same to the extent of expending \$15,000 or \$20,000 in grading and otherwise preparing its roadbed for laying ties and rails. The answer further avers that the subscriptions and mutual undertaking of the parties to construct the railroad constituted a good and sufficient consideration for the subscriptions made, whether of money or right of way, and, in addition, that appellant's land will be greatly enhanced in value by the building of the railroad and the erection of a depot, which will be only a mile and a half from his residence. By consent of parties the evidence

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on the issues formed by the pleadings was heard orally by the court, and the trial resulted in a judgment in favor of the appellee, from which, and the refusal of the lower court to grant it a new trial, appellant prosecutes this appeal.

It is proper to say that the charge of fraud in the procurement of appellee's signature to the writing executed by appellee was wholly disproved on the trial, and the only remaining question for this court to determine is as to the plea of no consideration.

We find that appellee, when asked by appellant's agents, Street & Gaines, to give the right of way, said he "wanted the road." In thus expressing himself, appellees seem to have been actuated by the general desire that inspired his neighbors and friends to contribute to the one common object that was expected to benefit the people of the county, which was the securing of a railroad. The undertaking originated with the citizens of Cadiz and vicinity, for they alone seem to have furnished by subscription the capital necessary to the success of the enterprise—some giving money, and others the right of way over their lands. "Where several promise to contribute to a common object, desired by all, the promise of each may be a good consideration for the promise of the others." *Parsons on Contracts*, vol. 2, page 452; *Twin Creek & Colmanville T. P. Road Co. v. Lancaster, etc.*, 79 Ky., 552, 3 R., 368; *Stovall v. McCutchen & Co.*, 21 R., 1317, 54 S. W., 969, 47 L. R. A., 287. But whether we are to regard appellee's grant to appellant of the right of way over his land as binding, upon the principle of mutuality, or not, we can not regard it as a mere gift of his property to a public charity, for by the building of the road he will derive profit from the increase in the value of his land. Besides, it appears that

it is three and a half miles, or more, from his residence to the nearest depot, whereas the building of the new railroad will provide a depot within a mile and a half of his residence.

There is yet another ground which we think, in all fairness, should operate as an estoppel to the plea of no consideration made by appellee. We find from the record that no work had been done by appellant in constructing its road at the time appellee executed the writing granting the right of way over his land, which was February 21, 1901, but after that date work was begun, and continued down to June or July, 1901, during which time the roadbed had been graded from Cadiz, a distance of seven miles, to a point near appellee's land; and, as it then became necessary for appellant's servants to grade and construct the roadbed on appellee's land, they went upon the same for that purpose, and had about finished clearing the roadway thereon of timber and other obstructions, when appellee met them, and for the first time advised them of his purpose to repudiate the writing granting the right of way, and by his command the work was then and there stopped. We know of no reason why the law of equitable estoppel should not be made to apply to a case like this. Indeed, we are told in the very admirable work of Thompson on the law of Corporations, vol. 4, sec. 5279, that it may be applied "where a landowner encourages, actively or passively, the appropriation of his land by a corporation for public use;" and we may add that a greater reason exists for its application where the landowner has, in writing, expressly consented to such use of his land.

There is yet another rule of law which holds that "any advantage to promisor or prejudice to promisee" is a sufficient consideration to support the contract. Stapp v.

Fox v. Willis and Others.

Bacon's Ex'r, 1 A. K. Marsh., 538. Applying this rule to the facts of the case at bar, we find that appellant, relying in good faith upon the subscriptions and donations made in aid of its undertaking, including the donation from appellee of the right of way over his land, began the construction of its road, and completed the roadbed to appellee's land, expending, as alleged, \$15,000 or \$20,000 in so doing. We think, therefore, that in view of the labor and expense thus incurred by appellant, superinduced, as it was, in part, by the grant from appellee of the right of way over his land, it would greatly prejudice its rights to permit appellee to withdraw the permission given to it to run its railroad over his land.

For the reasons herein given, the judgment of the lower court is reversed, and cause remanded, in order that appellee's petition may be dismissed.

CASE 106—ACTION BY F. T. FOX AGAINST THE BOARD OF SINKING FUND COMMISSIONERS OF LOUISVILLE, TO RECOVER FEES CLAIMED TO HAVE BEEN EARNED BY THE COLLECTION OF A CLAIM AGAINST THE GOVERNMENT. MRS. WILLIS, AS EXECUTRIX OF A. S. WILLIS, INTERVENES AND CLAIMS PART OF THE FEE UNDER A CONTRACT WITH PLAINTIFF. THE BOARD IS PERMITTED TO PAY INTO COURT THE SUM SUED FOR.—FEB. 25.

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APPEAL FROM JEFFERSON CIRCUIT COURT, CHANCERY DIVISION.

JUDGMENT AWARDING MRS. WILLIS PART OF THE FUND AND PLAINTIFF APPEALS REVERSED.

CLAIMS AGAINST THE GOVERNMENT—COLLECTION—FEE—MINISTER TO FOREIGN COUNTRY—ATTORNEY'S FEE.

Held: 1. Under Rev. St. U. S., section 5498 [U. S. Comp. St., 1901, p. 3707], prohibiting a person holding a place of trust or profit under the government from acting as agent for the pros-

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ecution of a claim against the United States, a person who has entered into a contract with another to assist him in prosecuting the claims of a city against the government, but who shortly afterwards accepts the post of minister to a foreign country, and holds such post during the prosecution of the claim, can not recover any fee for the prosecution of the claim.

2. Where a minister to a foreign country had, before taking up his duties, entered into a contract with another to assist in the collection of certain claims against the government, which were prosecuted during his term of office, he can, upon payment of the claims, recover from his associate any attorney fees and costs advanced for his benefit, though he can not recover any fee for services.
3. An attorney fee of \$500 certain and \$1,000 additional in case of success for the collection of a claim of \$19,017.05 by suit, is reasonable.

PIRTLE & TRABUE, HAZELRIGG & CHENAULT, AND O'NEAL & O'NEAL, FOR APPELLANT.

(No briefs for appellant.)

J. L. CLEMMONS, ATTORNEY FOR APPELLEES.

On March 18, 1890, the sinking fund commissioners of the city of Louisville employed appellant, F. T. Fox and Hon. Albert Willis, jointly, to prosecute and collect a claim against the United States government for income tax illegally collected by the government from said city, and authorized their president, W. R. Ray, to sign a contract with them agreeing to pay them one-half of the sum recovered; the said Fox and Willis to pay all the expenses of the litigation. They went to work at once, secured an act of congress waiving the statute of limitations and directing the secretary of the treasury to audit and settle said claim, and the result was the allowance of \$42,000 to the city of Louisville as a refund of taxes paid on dividends. But, by oversight the taxes paid on the interest on some bonds were not included in the \$42,000, and another proceeding was instituted at the instance of the commissioners upon the same terms to recover \$31,349 on this claim. The treasury department decided that the claim was just, but the comptroller of the treasury demanded that it should be credited by the sum of \$17,633 which had been improperly included in the \$42,000, that had been allowed. Finally the government paid the sum of \$13,735, reserving the \$17,633 and refused to pay any more. An appeal was taken to the court of claims, and finally to the supreme court, resulting in a recovery of \$19,017 including interest and costs.

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The commissioners notified the executrix of Willis and Fox, that they had the money and were ready to turn over one-half to them as their fee according to contract, the half being \$9,508. This constitutes the fund in court over which the present controversy has arisen.

Fox called on the commissioners and demanded the whole of the fund, denying that Willis owned any part of it. The commissioners refused to comply with his demand, whereupon Fox brought this action for the whole of the fund.

In the meantime Willis had been sent as minister to Hawaii and with the approval of Fox employed Judge Alonzo Hart, a lawyer of eminence in the city of Washington, to represent him in the further prosecution of these cases, and Hart had control for both Willis and Fox for about four years.

In October, 1893, Willis and Fox had an adjustment of their accounts as shown by the writing on file marked G. which shows that if the full amount of all the four cases was received, Willis should have \$11,957 and Fox should have \$7,250 and if less than the whole amount should be collected it should be settled in the same proportion, the difference being on account of Fox's indebtedness to Willis for advances previous to that date; since which time Willis advanced \$2,000, one-half of which became due to him by Fox as shown by itemized account on file marked F.

I have written this brief in great haste because I did not know the record had been carried up until twenty-four hours ago, having retired from active practice on account of my age (eighty-eight years). I feel somewhat embarrassed by being both counsel and witness in this case, but Mrs. Willis being my stepdaughter had the right to command my services as attorney, while my familiarity with the facts rendered my testimony indispensable.

OPINION OF THE COURT BY JUDGE NUNN—REVERSING.

The substance of the facts of this case are that in the year 1890 the Board of Sinking Fund Commissioners of the city of Louisville, Ky., by resolution of the board, renewed the contract with F. T. Fox and A. S. Willis that it had, in 1874, made with F. T. Fox and S. H. Wires, to recover from the United States Government internal revenue tax wrongfully collected from the city—Wires having died. By the contract, Fox and Willis were to receive a sum equal

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to one-half of any sum they might recover; they to pay all costs and their expenses. Fox had other like contracts for the recovery of claims against the Government, made with the State of Kentucky and Logan and Simpson counties (but they were only to receive on claims of counties a fee equal to 20 per cent. of the amount collected) in which contracts he procured the services of A. S. Willis, and agreed with him that they would divide the fees equally after deducting expenses. Under this arrangement, they prosecuted the claims, and on the 16th day of March, 1891, they collected from the Government \$42,514.03 on the Louisville claim. One-half of this sum—their fee—was divided between them on the basis of their agreement; Willis receiving the sum of \$11,257, and Fox \$10,000. On the 6th of March, 1894, they received further on their Louisville claim the sum of \$13,725.17, \$9,533.54 on their Logan county claim, and \$1,296.02 on their Simpson county claim. Their fees on these collections were adjusted and settled between Fox and J. L. Clemmons, as agent and attorney for Willis, who was then in Hawaii. Fox received \$3,435.58 and Willis \$5,658. This settlement was made on the 6th day of March, 1894, and the basis for same was a settlement made by Fox and Willis on the 20th of October, 1893. The agreement is in words and figures, to-wit:

"Louisville, Ky., 20th Oct., 1893. It is agreed by and between Albert S. Willis and F. T. Fox that in fees to be received from the city of Louisville, Simpson Co. and Logan Co., Ky., and the State of Kentucky, said Fox is to receive \$7,250.00 and said Willis \$11,957.04; but subject to this addition that if said Fox can get an allowance for expenses from Simpson county, the same is to be equally divided between them; and if the full claim for the State of Kentucky, then the additional fee for same is to be equally

divided between them, the additional sum for said State being supposed to be \$2,117.91. Said Willis is to pay the fee due Judge Hart of Washington. The above settlement is based on the payment of the claims aforementioned and is to be prorated if any of the claims is rejected. This settlement is in lieu of all others.

"F. T. Fox. Albert S. Willis.

"In the event said Fox can get from Logan county any allowance over the 20 per cent., now agreed to be paid by said county, the same is to be equally divided between them. 20th October, 1893. F. T. Fox. Albert S. Willis."

When these last sums were paid by the Government, it, by its officials, refused to pay the city of Louisville about \$17,000, which had been allowed when the last-mentioned claims were allowed; giving as a reason that it had by some error or mistake, when it paid the \$42,514, paid \$17,000 too much. And in March, 1894, an action was brought to recover this sum. The Board of Sinking Fund Commissioners were successful in the lower court, and the Government appealed to the Supreme Court, and lost again, and on the 20th of July, 1896, paid the sum, with its interest, to-wit, \$19,017.95, to the Board of Sinking Fund Commissioners of Louisville, Ky.; and on the 5th day of October, 1898, appellant, F. T. Fox, sued the commissioners for one-half thereof, claiming that he was entitled to it in his own right. The commissioners answered, and admitted that they held the money, but that Willis' executrix was claiming a part of same as a fee for A. S. Willis, under the resolution of the board employing Fox and Willis in the year 1890; and also stating that they, as such board, had been summoned as garnishees in actions by the Louisville Banking Company against Fox and G. W. McCready against Fox, and that the Louisville Trust Company had given them notice of a

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written assignment by Fox to it of his fee in said fund; and asked to be allowed to pay the fund in court, and for the court to adjudge to whom the fund belonged; and under order of court said fund of \$9,508.57 was paid in court. Mrs. Willis, as executrix of A. S. Willis, answered, and controverted plaintiff's statement that he was entitled to the whole fee, and alleged that she, as such executrix, was entitled to a part of the fee, to be divided in the proportions and under the contract of Fox and Willis made October 20, 1893; and also alleging that Willis and she, as executrix, had advanced to Alphonso Hart his fee of \$1,500. to prosecute this last action to a judgment, and had paid \$385 costs and claims for printing in and about the proper prosecution of the claims, and asked the court to adjudge to her from the fund a sufficient amount to pay same. The appellant replied to appellee's answer, and denied her claim, and stated that A. S. Willis, in the fall of 1893, was appointed by the President of the United States a minister to Hawaii, and that he accepted this appointment; that under section 5498 of the Statutes of the United States (U. S. Comp. St., 1901, p. 3707) Willis was prohibited from prosecuting any claim against the Government while holding such office, and that he held same until his death, which occurred in the year 1897; and that also he prosecuted the claim in his own name and right with the assistance of Hart, and that he had no knowledge or information that Willis took any part in the prosecution of the claim, or that he paid any costs of Hart's attorney fee, but says that he himself did not pay Hart, nor any costs except \$40. The lower court adjudged that Willis' executrix take \$6,924.35 of the fund, to which judgment appellant excepted, and the case is here on appeal.

The first or main question to be determined is can the executrix of A. S. Willis recover any part of the \$9,508 as fee for the prosecution of the action to recover a claim against the United States after Willis became minister to Hawaii? Section 5498, Rev. St. U. S. (U. S. Comp. St., 1901, p. 3707) is as follows: "Every officer of the United States, or any person holding any place of trust or profit, or discharging any official function under or in connection with any executive department of the Government of the United States, or under the Senate or House of Representatives of the United States, who acts as an agent or attorney for prosecuting any claim against the United States, or in any manner or by any means, otherwise than in the discharge of his proper official duties, aids or assists in the prosecution or support of any such claim, or receives any gratuity, or any share of or interest in any claim from any claimant against the United States, with intent to aid or assist, or in consideration of having aided or assisted, in the prosecution of such claim, shall pay a fine of not more than five thousand dollars, or suffer imprisonment not more than one year, or both." In 2d Edition of American & English Encyclopedia of Law, page 933, this language is found: "That principle of law which holds that no one can lawfully contract to do that which has a tendency to be injurious to the public or against public good is well settled, and may be termed the policy of the law. And courts have not hesitated to declare illegal and unenforceable contracts which they have considered against the public policy." Again, on page 939, it is said: "In some early cases a distinction was taken in reference to the validity and enforcement of contracts between acts *mala prohibita* and acts *mala in se*, but in the words of an eminent jurist this has long since been exploded.' It was not founded upon any

sound principle, for it is equally unfit that a man should be allowed to take advantage of what the laws says he ought not to do, whether the thing be prohibited because it is against good morals, or whether it be prohibited because it is against the interest of the State. When the statute expressly provides that a violation thereof shall be a misdemeanor, it would seem clear that it was the intention of the Legislature to render illegal contracts violating the statute." The same principles are stated in the case of *Steele v. Curle*, 4 Dana, 384. In the case of *Lindsay v. Rutherford*, 17 B. Mon., 247, the court said: "A contract is void if prohibited by statute, though the statute only inflicts a penalty; because such a penalty implies a prohibition. If the contract be illegal, it makes no difference, in point of law, whether the statute which makes it so has in view the protection of the revenue or any other object. The question to be considered is, does the statute prohibit the contract attempted to be enforced?" In case of *Ex parte Curtis*, 106 U. S., 371, 27 L. Ed., 232, Chief Justice Waite reviewed the legislation of Congress on the subject of the disability of officers of the United States in matters of claims against the United States from the beginning of the Government, and referred to section 5498 of the Statutes (U. S. Comp. St., 1901, p. 3707) as follows: "Which prohibits every officer of the United States or person holding any place of trust, profit or discharging any official function under or in connection with any executive department of the Government, from acting as an agent or attorney for the prosecution of any claim against the United States." It is admitted that A. S. Willis held the position of minister to Hawaii from this Government from the last of the year 1893, until his death, in 1897, and his case comes within the principles

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above referred to. The contract is in fact prohibited by section 5498 of the Revised Statutes of the United States, though the statutes only inflict a penalty, because the penalty implies a prohibition. If Mr. Willis, while an officer of the United States, as attorney, had prosecuted any claim against the United States, or assisted in the prosecution of such claim, he was liable to a fine of not more than \$5,000 or imprisonment for not more than one year, or both; and, the penalty for doing the act being imposed, the act itself was prohibited by law. The court is of the opinion that his executrix is not entitled to recover any part of the fund as a fee for the prosecution of the claim. But we are of the opinion that out of said fund Willis' estate should be reimbursed for the money advanced for the benefit of appellant in the prosecution of the claim, and for the amount due Willis from appellant, as shown by their settlement of October 20, 1893, \$4,707.04, less the amount paid him as on their settlement in March, 1894, \$2,222.42, with 6 per cent. interest to the date the sinking fund commissioners paid the fund into court, to-wit, October 4, 1898. The contract of Fox and Willis of date of October 20, 1893, and the settlement of March, 1894, show that at the last date, and after the completion of the settlement, appellant was indebted to Willis in the sum of \$2,484.62, and the proof shows that Willis paid Hart, for appellant, on the 4th of October, 1894, the sum of \$500. The record shows parties agree that statement in contract of 20th of October, 1893, "that Willis is to pay Hart," had no reference to \$1,500 paid Hart, but referred to other and premium fee, and paid for him for printing a brief, August 13, 1894, the sum of \$60, and March 12, 1896, \$120, and November 1, 1895, J. P. Morton account, \$180, and costs paid for appellant December 11, 1897, by Willis' executrix, \$25. and paid Judge Hart balance

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of fee on August 20, 1898, \$1,000—making, with interest, the sum of \$5,244.76, the amount which the court should have adjudged to Willis' executrix. The appellant should not complain at the amount of the fee to Hart. A fee for the collection of a claim of \$19,017.05 by suit, when the claim was litigated for a fee of \$500 certain and \$1,000 additional in case of success, seems to us a not unreasonable fee, and we are satisfied that the contract made with Judge Hart by Clemmons on such terms proved to be very beneficial to appellant.

For the above reasons, the case is reversed, and the cause remanded for further proceedings consistent herewith.

Response by Judge Nunn to application to modify opinion April 17, 1903.

The appellant asks this court to modify the opinion herein to the extent that he be not charged the \$180, the amount paid to J. P. Morton & Co., and the amount of \$2,222.42; appellant claiming that he has paid and settled these sums. We have again examined the record, and find that appellant is mistaken. It appears from the record that Mrs. Willis, as executrix, paid the Morton & Co. claim. Appellant is mistaken when he states that this court, in the opinion, charged him with \$2,222.42. On the contrary, he is credited with it, and properly credited, as shown by the record and receipt of J. L. Clemmons. The settlement of October 20, 1893, and the deposition of Mr. Fox in answer to question 41, show that Fox at that time was indebted to Willis in the sum of \$4,707.04, and in the settlement of March 6, 1894, Fox paid on that debt the sum of \$2,222.42, leaving a balance due on that matter of \$2,484.62, which sum is charged to him in the opinion.

Appellant also moved the court to adjudge him 10 per cent.

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damages on \$6,924.35, the amount adjudged to appellee in the lower court, and alleged to have been withdrawn by her. We are not aware of any law authorizing this court, on the reversal of a case, to assess such damages. If appellee, under the judgment of the lower court, withdrew from the court the sum of \$6,924.35, and did not return it, then she received \$1,679.59 more than she was entitled to, as shown by the opinion of this court; and on the return of this case the lower court should order her to pay into court the sum of \$1,679.59, with 6 per cent. interest from the time she received it until she pays it.

Petition for rehearing by appellee overruled.

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CASE 107—ACTION BY SARAH JANE MOONEY AGAINST THE ANCIENT ORDER OF UNITED WORKMEN GRAND LODGE OF KENTUCKY ON A BENEFIT CERTIFICATE.—FEB. 26.

Mooney v. Ancient Order of United Workmen Grand Lodge of Kentucky.

APPEAL FROM WEBSTER CIRCUIT COURT.

JUDGMENT FOR DEFENDANT AND PLAINTIFF APPEALS REVERSED.

INSURANCE—MUTUAL BENEFIT CERTIFICATES—INCORPORATION OF BY-LAWS—INSANITY—SUICIDE.

Held: 1. Kentucky Statutes, section 679, requires that the application, charter, and by-laws of an insurance company doing business in the State, or a copy thereof, shall be attached to the policy or certificate, before they can be treated as a part of the contract. A certificate issued by a mutual benefit association contained no stipulation as to suicide, but declared that it was subject to the by-laws of the order, which were not made a part of the certificate. The only provision in the by-laws on the subject of suicide was in the provisions prescribing the

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form of application for membership in the association. But the application signed by the insured was on a different form, and contained no stipulation as to suicide. **HELD**, that the by-laws relating to suicide could not be considered as a part of the certificate, so as to enable the insurer to make a defense based thereon.

2. An insured in a mutual benefit certificate, containing no stipulation as to suicide, committed suicide. He was about twenty-two years of age. His father had died four months before. He had no reason to complain of life. At the death of his father he acted singularly, and continued to so act from time to time. Some of his friends before he killed himself thought him insane. His conduct on the night before his death and at the time of the suicide tended to sustain this conclusion. **HELD**, that the question whether he was sane or insane at the time of the suicide was for the jury.
3. A mutual benefit certificate, payable to a designated beneficiary, and which is silent on the subject of suicide, becomes void if the insured commits suicide when sane.
4. The certificate does not become void if the insured commits suicide when insane.
5. Insured was insane at the time of committing suicide if he was then without sufficient reason to know what he was doing, or to distinguish right from wrong, or if he had not sufficient will power to govern his actions by reason of some insane impulse which he could not control.

PRATT MAHAN & WADDILL, FOR APPELLANT.

POINTS DISCUSSED.

The only defense is an alleged "suicide by-law." This is unavailing for these reasons, viz.:

1. There is no valid proof of adoption.
2. It is admitted that the grand lodge did not adopt, but there is some incompetent evidence that the supreme lodge had adopted a suicide clause. The charter requires an adoption by the grand lodge. Section 5 of charter controls, carrying into effect No. 6 of "objects," and not section 4 of charter relating merely to relief fund meeting No. 5 of "objects." Besides the powers and rights of supreme lodge under charter were repealed by act of April 3, 1898. The grand lodge can not delegate this legislative duty to the supreme lodge or to the committee or other agency.
3. The supposed by-law must be interpreted in the light of the report of the "representatives" and made to apply to those persons only who, at the time of obtaining membership

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had an intent to defraud the order by committing suicide. The pleadings make this issue. There is not a scintilla of evidence as to such intent.

4. It is admitted by the pleadings and the journals show that the order intended the suicide clause if adopted to be binding only in the event it was in the application signed by the member.

5. There should be recovery under the very terms of the by-law for the proof is conclusive that the member killed himself in delirium resulting from disease.

6. Under forfeiting clause for suicide, "sane or insane," there can be recovery when the member is so insane when he committed the act as not to comprehend the physical nature and consequences of his act. This issue was made, there was strong evidence on both sides. The jury should have been permitted to pass upon it.

7. A clear case of waiver. Appellee is estopped from setting up the suicide clause.

8. Both the pleadings and the proof entitle plaintiff to her full demand.

9. Plaintiff's demand is just and meritorious. The defense is technical and inequitable. There should be reversal with directions to render judgment for plaintiff for her full claim

AUTHORITIES.

1. The fund in question must be controlled by "the corporation." Grand Lodge Charter, sec. 5.

The grand lodge can not delegate this duty. *Knights of Pythias v. Stein*, 37 L. R. A., 775; *Knights of Pythias v. La Malta*, 30 L. R. A., 838.

3. Suicide clause not part of contract. *Waiver. Estoppel. Woodmen of World v. Fraley*, 51 L. R. A., 898; *Davidson v. Benefit Soc.*, 1 L. R. A., 482; *Manning v. A. O. U. W.*, 86 Ky., 136; *Bacon Ben. Soc.*, sec. 171, 179, 426; p. 214, 229, 636; *Nib. Ben. Soc.*, sec. 147.

4. Suicide, generally. *Mut. Ben. Ins. Co. v. Daviess*, 87 Ky., 541; *Seiler v. Life Asso.*, 43 L. R. A., 537; *Patterson v. Ins. Co.*, 42 L. R. A., 253; *Adkins v. Ins. Co.*, 35 Am. Rep., 410; 3 L. R. A., 486; 6 Ib., 495; 32 Ib., 473; 17 Ib., 89 notes; 47 Ib., 681; 17 Am. Rep., 372, 689; 19 Ib., 623; 21 Ib., 549; 46 Ib., 17; 35 Ib., 410; 59 Am. Dec., 482; 89 Ib., 743; 15 Wall., 580; 3 Am. & Eng. Ency., 2d, p. 1016; 3 *Joyce Ins.*, sec. 2653; 2 *May Ins.* sec. 392; *Cooke Ins.*, sec. 70; *Bliss Ins.*, sec. 330; 2 *Phillips' Ins.*, p. 626.

5. *Read these leading cases. Woodmen of World v. Fraley*,

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51 L. R. A., p. 898; Davidson v. Ben. Soc., 1 L. R. A., p. 482; Manning v. A. O. U. W., 86 Ky., 136; Knights of Pythias v. Stein, 37 L. R. A., p. 775; Knights of Pythias v. La Malta, 30 L. R. A., p. 838; Mut. Ben. Ins. Co. v. Davless, 87 Ky., p. 541.

YEAMAN & YEAMAN, FOR APPELLEE.

THE CERTIFICATE SUED ON.

Appellant sued appellee upon the following certificate:
No. 11,777. GRAND LODGE, \$2,000.00
ANCIENT ORDER OF UNITED WORKMEN
OF KENTUCKY.

1. This certificate issued by the grand lodge of the Ancient Order of United Workmen of Kentucky, witnesseth that Brother John G. Mooney, a workman degree member of J. L. Dorsey Lodge No. 98, of said order, located at Dixon, in the State of Kentucky, is entitled to all the rights, benefits and privileges of membership in the Ancient Order of United Workmen and to designate the beneficiary to whom the sum of two thousand (\$2,000) dollars of the beneficiary fund of the order shall at his death be paid. This certificate is issued subject to and is to be construed and controlled by the laws of the order. He designates as beneficiary under the terms hereof Sarah Jane Mooney bearing to him the relation of mother. In witness whereof the grand lodge has caused this to be signed by its grand master workman and grand recorder and the seal thereof to be attached this 29th day of November, 1899.

JOHN W. BAKER, Grand Master Workman.

Attest: J. G. WALKER, Grand Recorder.

2. The Defense. The defense was that the person to whom the certificate was issued, John G. Mooney, was admitted to appellee order under his agreement to be governed and to abide by its constitution, by-laws, rules and orders; that at the time of the issual of the certificate sued on, it was provided by said by-laws and constitution that if within two years after the issual of said certificate the member to whom it was issued should come to his death by suicide, whether sane or insane, except in delirium resulting from disease, or while under treatment for insanity, or after a judicial declaration of insanity; then the only sum that should be paid or which is payable to the beneficiary named in the certificate should be the amount that may have been paid into the beneficiary fund of the order by such member. That said John G. Mooney in less than six months after the issual of said certificate came to his death while sane by voluntarily and intentionally committing

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suicide and destroying his own life by shooting himself with a pistol; that he was not at the time in delirium resulting from disease, nor under treatment for insanity; nor had there been any judicial declaration of his insanity; that during his membership he had paid into the order the sum of \$4.80; which was tendered. It is further pleaded in defense:

"That after the execution and issual of said certificate, he on the — day of — 1900, and within six months after the certificate sued on was issued, while sane, voluntarily and intentionally, for the purpose of destroying his own life, shot and wounded himself with a pistol, of which shot and wound he soon thereafter died, so defendant says it is not true that said Mooney died a workman degree member of said order in good standing, nor that the defendant is justly indebted to the plaintiff in the sum of \$2,000 or any sum.

The clause in the constitution of the order referred to in the answer, is as follows:

"I further agree that if within two years after the date of my taking or receiving the said workman degree, my death should occur by suicide, whether sane or insane, except in delirium resulting from disease, or while under treatment for insanity, or after a judicial declaration of insanity, then the only sum which shall be paid, or which is payable to my beneficiaries named in my beneficiary certificate, shall be the amount which I may have paid into the beneficiary fund of the order during the term of my membership." See page 22 of constitution of A. O. U. W. filed with transcripts.

3. The instructions and verdict. The following instruction was given to the jury and a verdict returned accordingly:

"The court instructs the jury that it is admitted that John G. Mooney committed suicide within two years after the issual of the certificate sued on, and there being no proof or claim that when he did so he was in a delirium resulting from disease, nor while under treatment for insanity, nor after a judicial declaration of insanity they can therefore only find for the plaintiff the sum of four dollars and eighty cents, the amount that had been paid into the beneficiary fund by the deceased, with interest thereon from March 2, 1900, the date of said Mooney's death, and they will return a verdict for that sum."

4. No other instructions could have been given. The nature of the appellee order, and its constitution, the certificate in question, and the evidence as to the death of assured made any other instruction impossible. But if we leave out of view the nature of appellee order and its constitution, then the appellant would not have been entitled to the verdict for the

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\$4.80, and the court should have instructed the jury to find for the defendant.

5. Mooney not insane. The evidence establishes the fact that John G. Mooney intentionally took his own life while sane; when he was "not in delirium resulting from disease, nor while under treatment for insanity nor after there had been a judicial declaration of insanity." The act was deliberate, intentional, and perpetrated with a full knowledge of all the consequences.

6. Laws of order a part of contract. The constitution of such an association is its fundamental law, to which all who come within its operation must conform, and the constitution of appellee in this case is to be read into, and becomes a part of the contract sued on. The very certificate sued on sets forth that it "is issued subject to and is to be construed and controlled by the laws of the order." *Am. & Eng. Ency. Law*, 3d ed., vol. 3, p. 1059; *Morawetz Priv. Cor.*, 2d ed., sec. 494; *Presby'n Mut'l Assn. Fund v. Allen*, 106 Ind., 593; *Burgman v. St. Paul Mut. &c.*, 29 Minn., 278; *Sherry v. Plasterers' Union*, 139 Pa. St., 470.

The certificate of membership constitutes the contract, but it is to be construed and governed by the company's charter—(The Presbyterian Mutual Assurance Fund). In fact it may be said that the charter is a part of the contract. *Van Bibber's Admr v. Van Bibber*, 82 Ky., 184.

And the charter or constitution will be construed liberally so as effectuate the objects of the order. *Van Bibber's Admr. v. Van Bibber*, 82 Ky., 347; *Woolford's Appeal*, 126 Pa. St., 47; *Messen v. Mut. Ref. Sec.*, 102 N. Y., 523; *Supreme Comy., &c. v. Ainsworth*, 46 Am. Rep., 332.

And by-laws enacted by Mutual Benefit Association avoiding payment of a policy if the assured dies by suicide either sane or insane, binds its members whose contracts require compliance with all laws, "now in force or that may hereafter be enacted by the supreme lodge." *Supreme Lodge, &c., v. Trebble*, 179 Ill., 348.

7. Suicide raises no presumption of insanity. The law presumes sanity and insanity will not be presumed from the fact of suicide. "The burden of proving insanity is upon the party offering it, and opinions of witnesses based upon their observations of the mental condition of the insured previous to the suicide, and not formed upon knowledge or observation of his facts or condition at the time of suicide, have no tendency to prove that the killing was involuntary." *Weed v. Mut. B. & L. Ins. Co.*, 70 N. Y., 561; *Joyce on Ins.*, vol. 4, sec. 3775; *Meacham v. N. Y. Mut. Assn.*, 120 N. Y., 237; *McCline v. Mut. L. Ins.*

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Co., 55 N. Y., 65; Breasted v. L. & T. Co., Am. Dec., 496, and note 7, citing many cases.

Mr. Justice Miller in his charge to the jury, says, "There is no presumption of law, *prima facie* or otherwise, that self destruction arises from insanity." Terry v. Ins. Co., 1 Dill. (C. C.) 40, 15 Wall., 580; Merritt v. Cotton State Ins. Co., 55 Ga., 103; Knickerbocker Ins. Co. v. Peters, 42 Md., 414; Weed v. Mutual, &c., 35 N. Y. Super Ct., 386; Hathaway v. National, &c., 48 Vt., 335.

OPINION OF THE COURT BY JUDGE HOBSON—REVERSING.

Appellee, the Ancient Order of United Workmen, is a corporation created by the laws of Kentucky. It consists of a supreme lodge and subordinate lodges. A beneficiary fund is set apart for the benefit of the families or heirs at law of deceased members. Benefit certificates are issued to the members, and they have the right of naming their beneficiaries. It is a fraternal association, governed by the lodge system under the supervision of a supreme lodge, which pays no commissions and employs no agents, except in the organization of local subordinate lodges and supervising their work. John G. Mooney held a certificate in the order, and while in regular standing shot himself on March 2, 1900. His mother was named as his beneficiary, and sought in this action to recover of the order on the benefit certificate. The defendant resisted recovery on the ground that the assured while sane voluntarily took his own life and at the conclusion of the evidence, the court peremptorily instructed the jury to find for the defendant. The certificate sued on is in these words: "This certificate, issued by the Grand Lodge of the Ancient Order of United Workmen, of Kentucky, witnesseth: That Brother John G. Mooney, a workman degree member of John L. Dorsey Lodge, No. 98, of said order, located at Dixon, in the State of Kentucky, is entitled to all the rights, benefits, and privileges of membership in the Ancient Order of United Workmen, and to designate the beneficiary to

whom the sum of two thousand dollars of the beneficiary fund of the order shall, at his death, be paid. This certificate is issued subject to, and is to be construed by, the laws of the order. He designates, as beneficiary under the terms hereof, Sarah Jane Mooney, bearing to him the relation of mother. In witness whereof the Grand Lodge has caused this to be signed by its Grand Master Workman and Grand Recorder, and the seal thereof to be attached this 29th day of November, 1899. John W. Baker, Grand Master Workman. J. G. Walter, Grand Recorder." It will be observed that there is nothing in the certificate in regard to suicide, or providing that the company shall not be liable if the assured killed himself. It was, however, pleaded by the defendant that this was stipulated in the laws of the order, and that by the terms of the certificate it is to be construed and controlled by these laws. The only thing in the laws of the order on the subject is in section 8, article 10, of the by-laws, which, among other things, prescribes a form of application to be used by applicants for membership. In this form so prescribed, these words are used: "I further agree that if, within two years after the date of my taking or receiving the workman degree, my death should occur by suicide, whether sane or insane, except in delirium resulting from disease, or while under treatment for insanity, or after a judicial declaration of insanity, then the only sum which shall be paid, or which is payable, to my beneficiaries named in my beneficiary certificate, shall be the amount which I may have paid into the beneficiary fund of the order during the term of my membership." But the application which the deceased in fact signed was on a different form, and was in these words: "November 29, 1899. To the Grand Lodge of Kentucky: I, John G. Mooney, having made application for the workman degree in John L. Dorsey Lodge,

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No. ——. Ancient Order of United Workmen, State of Kentucky, do hereby agree that compliance on my part with all the laws, regulations, and requirements which are or may be enacted by said order is the express condition upon which I am to be entitled to have and enjoy all the rights, benefits, and privileges of said order. I certify that the answers made by me to the questions propounded by the medical examiner of this lodge, which are attached to this application, and form a part thereof, are true. I further agree that the beneficiary certificate to be issued hereon shall have no binding force whatever until I shall have taken the workman degree of said order, and until my medical examination has been approved by the Supreme or Grand Medical Examiner, as the case may be. I hereby authorize and direct that the amount to which my beneficiaries may be entitled, to-wit, \$2,000.00 of the beneficiary fund of the order, shall, at my death, be paid to Mrs. Sarah Jane Mooney, bearing relation to me of mother."

It would seem from the evidence that the by-law providing for the form of application above quoted was of recent adoption, and that forms of application made out according to it had not been sent out to the subordinate lodge at the time the deceased joined. The proof on this subject is not clear; but, however it may be, he in fact used the old form, and, so far as the proof shows, knew nothing of the other form. We are therefore of opinion that his contract can not be tested or in any way affected by a mere form of application which had been ordained by the Grand Lodge, but which was not in fact used in his case. In the Supreme Commandery of the United Order of the Golden Cross v. Hughes 114 Ky., 175 (24 R., 984), 70 S. W., 405, it was held that section 679 of the Kentucky Statutes is applicable to societies such as appellee, and that the application for the certificate

or the by-laws or other rules of the corporation, unless attached to and accompanying the certificate, can not be received in evidence or considered a part of the contract in any controversy between the parties interested in the certificate. As the by-law in question was not made a part of the certificate or attached to it, it can not be considered, and the defense to the action based on this by-law can not be maintained. The peremptory instruction of the circuit court to the jury to find for the defendant by reason of the by-law was, therefore, erroneous.

There being nothing in the certificate in regard to suicide, the question remains, is it a defense to the action that the deceased while sane voluntarily killed himself? The proof shows that the deceased was about 22 years old; his father had died four months before, leaving the deceased, his mother, and a younger brother surviving him; the deceased had been made postmaster in the room of his father at the town of Dixon, Webster county. He had no other insurance on his life. His health was good. So far as the evidence goes, he had no reason to complain of life. At the death of his father, he had acted very singularly, and this he had kept up from time to time since. Not a few of his friends before he shot himself thought him of unsound mind. His conduct on the night before his death and at the time of the shooting tended to sustain this conclusion, and there was sufficient evidence to go to the jury on the question as to whether he was sane or insane at the time. The rule as to suicide where the policy is silent on the subject is thus well stated in 19 Amer. & Eng. Ency. of Law, page 73: "If the insured in a contract of life insurance, taken out for the benefit of his estate, or payable to a beneficiary, the designation of whom may be changed at the option of the insured with the consent of the insurer, commits suicide,

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the policy is void if the insured was sane when he took his own life, and this for two reasons: In the first place, every contract of life insurance must be construed to contain an implied condition that the insured will not intentionally terminate his life, but that the insurer shall have the benefit of the chances of its continuance until terminated in the natural ordinary course of events. It is upon these chances that the premium is calculated and the contract is founded; hence the suicide of the insured operates as a fraud upon the insurer, and especially is this so when the insurance is taken out in contemplation of the act. In the second place, the enforcement of the contract in case of death by suicide is opposed to public policy. If the contract should expressly include death from this cause, the provision, even if not prohibited by statute, would be contrary to public policy, in that it tempted or encouraged the insured to commit suicide, and it is obvious that the court will not imply a condition which if expressed in the contract would render it void. But when the policy is made payable to a nominated beneficiary, and contains no stipulation that it shall be void in case of the death of the insured by suicide, it may be enforced, notwithstanding the insured dies by his own hand, unless, perhaps, where the policy was taken out in contemplation of suicide." See also, to this effect, *Hartman v. Keystone Mutual Life Insurance Co.*, 21 Pa., 466; *Smith v. National Benefit Society*, 123 N. Y., 85, 25 N. E., 197, 9 L. R. A., 616; *Ritter v. Mutual Life Insurance Co.*, 169 U. S., 139, 18 Sup. Ct., 300, 42 L. Ed., 693; *Knights Golden Rule v. Ainsworth*, 46 Am. Rep., 332; *Bliss, Life Insurance*, section 242. Note to *Breasted v. Farmers' Loan & Trust Co.*, 59 Am. Dec., 487.

It is earnestly insisted that if the insured, when he fired the fatal shot, had sufficient mental power to know that it

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would take his life, and fired the shot with that intention, there can be no recovery. We are referred to authorities so holding under certain policies containing stipulations as to suicide when insane, but we do not think this rule applicable to a case where the policy is entirely silent. The only reason that the death of the insured by his own hands is allowed to defeat the policy in such a case is, in the end, that it is a fraud on the company. But there can be no fraud by one who is insane. Those who issue such policies know that men are liable to become insane, and that insane persons at times commit suicide. If they wish to protect themselves from this risk, they should so provide in their policies. Where the policy is silent, we are unwilling to go beyond the rule above laid down exempting the company from responsibility where the insured voluntarily kills himself while sane. For the contract of insurance must be treated like any other contract, and the act of an insane person is not a defense to actions on any other contract, so far as we know. Under the evidence, the court should have submitted to the jury the question whether the assured voluntarily killed himself while sane. We intimate no opinion as to what should be the rule where the policy has, under the terms of the policy, become incontestable. The deceased was insane at the time of the shooting if he was then without sufficient reason to know what he was doing, or to distinguish right from wrong, or if he had not then sufficient will power to govern his actions, by reason of some insane impulse (the result of mental unsoundness) which he could not resist or control.

Judgment reversed, and cause remanded for a new trial.

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CASE 108—ACTION BY ANN DILS AS EXECUTRIX OF COL. JOHN DILS AGAINST W. J. WILLIAMSON TO ENFORCE SPECIFIC PERFORMANCE OF A CONTRACT FOR SALE OF LAND.—FEB. 26.

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APPEAL FROM PIKE CIRCUIT COURT.

JUDGMENT FOR PLAINTIFF AND DEFENDANT APPEALS. REVERSED.

SPECIFIC PERFORMANCE—ENFORCEMENT INVOLVING HARDSHIP AND OPPRESSION.

Held: 1. A contract for the sale of an undivided interest in land provided that the land was to be surveyed by the vendee at his expense; that, when the amount thereof was ascertained, the vendee should pay a certain price per acre for the vendor's undivided interest, and the vendor should make a quitclaim deed. The vendee attempted to survey the land, but his surveyors were prevented by force from doing so; the vendee being advised that he would be in great danger of being killed if he went on the premises. Held: That as the contract could not be performed until the number of acres was ascertained by survey, and as this could not be done without great hardship to the vendee, specific performance would not be enforced.

HAGER & STEWART, ATTORNEYS FOR APPELLANT. (W. S. HARKINS AND R. T. DUKE, OF COUNSEL.)

STATEMENT OF THE CASE.

This cause comes into this court on appeal from judgment decreeing specific execution of contract of 12 of December, 1891, between appellant and Colonel John Dils. The contract, specific execution of which was decreed in the judgment appealed from (Rec. 670) is set out in petition filed July 2, 1895, by Colonel John Dils, as plaintiff, against appellant as defendant.

As the record is quite voluminous, counsel feel impelled to make a fuller statement of the issues and evidence than ordinarily pertains to a brief, deeming such course justified by the size of the record and conducive to a readier understanding of the case by the court.

The contract is set out in the petition (Rec. 6), and is for sale of real estate in Pike county, "it being the one-third interest in the Williamson-Dils and Joe Hall tract of land esti-

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mated to contain 18,000 acres, more or less, which land lies on the waters of Knox and Peter creeks and Tug river, in Pike county, Ky. This land is to be surveyed by party of the second part, and at his expense, and when the amount of said land is ascertained by survey, deducting the proper exclusions, then the party of the second part (Williamson) is to pay party of the first part two (\$2) per acre for party of the first part's one-third interest in said lands. Said survey shall be completed by the first day of April, 1892, at which time the purchase money shall be paid by party of the second part, and deed of quitclaim free of dower shall be made by party of the first part; *but in the event that said survey is not at that date completed*, but is well under way, and the party of the second part makes to the party of the first part a good substantial payment on said purchase money, then party of the second part shall have a further reasonable time to complete said survey, at which time the balance of the purchase money shall be paid and deed made as above stated."

It was further therein provided that Williamson should have thirty days to purchase land at the price and upon the terms mentioned, if he should signify to Dils, or O. C. Bowles, whether or not he should take the land, and if decided to take the land, then the two thousand dollars mentioned as consideration for execution of the contract, evidenced by his note due and payable thirty days from that date, should be considered as part of the purchase price; otherwise should be forfeited; and further that Dils would carry out as to his one-third interest, agreement between the said parties for conveyance to John Hardin of part of the land theretofore sold by the parties.

PROPOSITIONS OF ARGUMENT AND CITATIONS OF AUTHORITY.

1. The sale was by the acre, and the area to be ascertained by survey. Guess work or surmise can not afford basis of certain recovery, or justify departure from the standard measure of the contract.
2. Specific execution of contracts in equity is matter not of absolute right in either party, but of sound and reasonable discretion of the court, and will never be adjudged unless equitable so to do. *Cocanougher v. Greene*, 93 Ky., 519; *Woollums v. Horsley*, *Ibid*, 582; *Patterson v. Bloomer*, 95 Am. Dec., 218; *Stokes v. Stokes*, 156 N. Y., 571; 2 Story, 750A.

The required element of certainty in specific execution of contract is lacking.

3. The decree is not supported, because by it the vendee does not receive the title he contracted for. *Fry Spec. Perf.*, 427; *Pomero*y, 454, 203, 229, 231.

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The conditions supervening the date of contract and the attempt to make the survey, conceding they were not brought about by act or omission of the parties, present a case of mistake of matter affecting the subject matter of the contract, and defeat its specific execution. *Pomeroy*, 229, 231, 268, 371.

4. The court will not specifically execute contract, and will give affirmative relief by rescission under the state of title disclosed by the record. *Williams, &c. v. Carter*, 3 Dana, 76; *Beckwith v. Kouns*, 6 B. M., 222; *Hightower v. Smith*, 5 J. J. M., 542; *Maupin on Marketable Land Titles*, 284-290; *Gans v. Renshaw*, 2 Pa. St., 34; 44 Am. Dec., 152.

JAMES GOBLE AND RATCLIFF & RATCLIFF, FOR APPELLEE.

1. THE HOSTILITY SHOWN TO APPELLANT'S TITLE.

The substance of this defense is, that because of hostility and threats of violence from others to appellant and those in his employ, he abandoned the work of surveying, failed to comply with the obligation he assumed to ascertain the number of acres sold at his expense; and on this default of himself, for which appellee never was responsible, he asks the court to rescind the contract, pay him back the \$2,000, and relieve him from all its obligations. There is no charge that appellee is responsible for any part of the opposition he has encountered in his feeble effort to have the land surveyed. To admit that he is excusable because of the violent threats complained of, even if they did go to the extent of endangering life; would be to acknowledge the inability of the law and government, which has the power of the people behind it, to protect a citizen in the enjoyment of his property and life, against the acts of a few violent men, who would use force rather than the law and the machinery it has provided. Courts can not confess any such weakness or want of power in the law. It is amply able to protect the life and property of all citizens from the violent acts of others. For this purpose the government has at its command the entire military and civil power; and when appealed to will exhaust its whole force before permitting either loss of life or property. When all the resources of government are brought into action, and the violence is so strong it is unable to overcome it, a dissolution of government follows, and anarchy and violence reigns.

If the threatened violence was such as to endanger life, or to prevent the peaceful execution of the contract, appellant can not justify the course he has adopted, and make his failure the basis and groundwork of an action for a rescission of it against the other party who is not to any extent in fault. When he found the violence and opposition too great to be overcome by peaceful and persuasive means, if he did so find it he should

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have appealed to the law, which could and would have protected him, the men in his employ, and the property from all danger.

To grant the rescission asked on the ground alleged would be equivalent to saying the law has no power to protect the life or property of a citizen against the violent and unlawful acts of a few, which would render courts useless and governments powerless

Appellant well knew the nature and character of opposition with which he would be confronted. He was not deceived, misled, or lulled into any feeling of security respecting the title to the property that was not real. He contracted to take the expense and burden of surveying the land on himself; and when he asks the court to excuse him from this obligation because of threatened violence from some half dozen men, it is no answer to appellee's response that the law is able to protect him, to say he is not required to call to his aid such extraordinary remedies. What is there so extraordinary about the plain simple process of the law that appellant could not resort to it? What other means or power could he have of guarding himself and property from violence and wrong?

When he met with the opposition complained of, if he did meet with it, to call to his aid the power of the law was his only remedy. Had he selected some other means of enforcing his rights, and suppressing the opposition, it would have been an extraordinary remedy in the extreme.

The court, or the clerk, if no court in session, would have granted him orders of survey at any time while the action was pending to the surveyor of Pike county, whose duty it would have been to execute them; and any unlawful interference to prevent their execution would have been a contempt of court; and the wrongdoer could have been put under bond sufficient to restrain him, or incarcerated in jail. Such a course would not have been quite so extraordinary, as the means used by appellant to get rid of the contract by refusing to perform the obligation he assumed without legal excuse, then making that refusal the groundwork for a rescission. If sending out a single surveyor clothed with the power of the law to do the work would have extended it through too long a period, then every one in the employment of appellant could have been made a special surveyor and armed with the same power.

At first blush, on reading the testimony in regard to the violence charged, it appears to have been considerable; but when it is critically examined, the small number engaged in it considered, together with the depositions of those who were honored with the title of leadership in opposition, we are constrained to

believe it was more a pretext to get rid of the bargain than anything else.

We feel justified in saying there is more noise than substance in the charge of violence, alleged as an excuse for not surveying the land. Appellant seeks to magnify the opposition and make it look formidable by having each witness to state what the same party said, when the truth is, there were not more than two men proved to do anything—Blankenship and Hurley—and they both testify that the charges against them are false.

2. THE CLAIM FOR RESCISSION CONSIDERED.

Before the court will decree a rescission it must appear the complaining party will be subjected to some loss, hardship, or inequitable result growing out of the contract he did not know, or which a reasonably prudent man would not have been expected to know at the time of making it. If all the circumstances and conditions surrounding and connected with it, or the subject-matter of it, are known to him, and he enters into it with his eyes fully open to all the facts, and to the whole truth, the other party not being to any extent in fault, he can not have a rescission because he has become dissatisfied with his bargain.

A rescission is a cancellation or annulment of the contract, which must be promptly sought. The most essential prerequisite is the party seeking it must show his ability to return to the other all he received by it. Each party must be given back all he parted with by it. They must be placed in *statu quo*, which means both after the rescission must occupy the same relation to the subject-matter of it they did before it was made. If one parted with his right to a specific thing, the thing must be restored. If it was for the sale of land the land must be given back. This proposition is so self-evident that authority to support it is hardly necessary, but *Chaplain v. Burton*, 2 J. M., 216; *Clark v. Finnell*, 16 B. M., 338; *Lacy v. McMillan*, 9 B. M., 525; *Miller v. Johnson*, 9 Dana, 48, and *Black v. Oldham*, 4 Dana, 196, and many others which could be cited, are in point.

The title to the thing given back must be as good and valuable when it is returned as when parted with by the contract.

Can appellant place his vendor in *statu quo*? It is manifest from his own showing he can not, for he has already sold the land to another.

3. THE RIGHT TO A SPECIFIC PERFORMANCE CONSIDERED.

This is called an action for the specific performance of a contract. While this is in a measure true, it partakes no more strongly of the nature of such an action than any other pro-

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ceeding by a vendor against his vendee to enforce a lien on the property for the purchase price. The rule that such remedies are never granted as a matter of right, but rest on the sound discretion of the court does not apply to a case like this. This statute giving the vendor a lien for the purchase price would be of no value if the enforcement of it was left alone to the discretion of the court. If appellant has failed to show a right to a rescission, he has failed to show why a specific performance should not be had.

If appellant knew exactly the kind of title his vendor had, the difficulties that existed and surrounded it, the opposition he would encounter from those who were unfriendly to his claim; and with a full knowledge of all these facts agreed to accept the title as it was, without warranty, and by a quitclaim deed, he took it at his own risk, and must now be contented with the thing he bought, and pay the price he agreed to pay.

AUTHORITIES CITED IN THIS BRIEF.

McMillan's Heirs v. Hucheson, &c., 4 Bush, 611; Terry v. Johnson, 86 Ky., 95; Russell v. Doyle, &c., 84 Ky., 386; Chaplain v. Burton, 2 J. J. M., 216; Clark v. Finnell, 16 B. M., 338; Lacy v. McMillan, 9 B. M., 525; Miller v. Johnson, 9 Dana, 48; Black v. Oldham, 4 Dana, 196; Lyones v. Osborn, 7 B. M., 305; Harper v. C. N. O. & T. P. R. Co., 15 R., 225; Rawlins v. Timberlake, 6 Mon., 230; Cummins v. Boyle, 1 J. J. M., 480; Camren v. Bell, 2 Dana, 328; Pom. on Con. Spe. Perf., sec. 346; Fry on Spe. Perf., sec. 857; Sugden on Ven., by J. C. Perkins, p. 505; Devlin on Deeds, vol. 1, sec. 27; Davis v. Bowland, 2 J. J. M., 27; Shackelford v. Wright, 13 R., 62.

OPINION OF THE COURT BY JUDGE PAYNTER.—REVERSING.

On December 12, 1891, the appellant, Williamson, and Col. John Dils entered into a contract by which the appellee sold to appellant an undivided one-third interest in what is known as the "Williamson-Dils Survey," in Pike county, Ky., supposed to contain within its exterior boundaries some thirty-odd thousand acres. So much of the contract as is necessary for the consideration of this case reads as follows: "It being the one-third interest in the Williamson-Dils and Joe Hall tract of land, estimated to contain 18,000 acres, more or less, which land lies on the waters

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of Knox and Peter creeks and Tug river, in Pike county, Ky. This land is to be surveyed by party of the second part, and at his expense, and when the amount of said land is ascertained by survey, deducting the proper exclusions, then the party of the second part (Williamson) is to pay party of the first part two (\$2) dollars per acre for party of the first part's one-third interest in said lands. Said survey shall be completed by the first day of April, 1892, at which time the purchase money shall be paid by party of the second part, and deed of quitclaim, free of dower, shall be made by party of the first part; but in the event that said survey is not at that date completed, but is well under way, and the party of the second part makes to the party of the first part a good, substantial payment on said purchase money, then the party of the second part shall have a further reasonable time to complete said survey, at which time the balance of the purchase money shall be paid and deed made as above stated." It will be observed that the parties estimated that Dils had a one-third interest in 18,000 acres of land, more or less. It was a sale by the acre, and the contract price was \$2 per acre. The parties understood that all "proper exclusions" should be deducted. It was contemplated that, in order to ascertain the number of acres in which Dils had an interest, a survey was necessary, which was to be made at the expense of the appellant. It was to be completed by April 1, 1892, but, if not done, then, upon a good, substantial payment on the purchase money, further reasonable time to complete the contract was to be given the appellant. After the quantity of land was ascertained for which Williamson was to pay, Dils was to make him a quitclaim deed. Before and after April 1, 1892, Williamson had two or three corps of surveyors in the field, with a view of complying with his contract, but being unable

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to complete it in March, 1892, he gave Dils notice that it could not be done, and made what he regarded as a substantial payment on the purchase money. The survey was never completed. Dils instituted this suit for specific performance of the contract, and prayed that a survey might be made at the expense of the appellant, to ascertain the number of acres for which he agreed to pay. Among other things, it was averred in the answer that at the date of the contract it was not known by either Williamson or Dils to what extent the lands embraced in the Dils-Williamson patent had been entered, surveyed, and patented prior to the 24th day of June, 1872, the date of the Williamson-Dils patent; that no survey of the land excepted from the grant had ever been made before or after that patent had been issued, and for this reason the provision was inserted in the contract for the ascertainment of the number of acres for which Williamson should pay; and that the sale and purchase would depend upon such survey. It is also averred in the answer that appellant undertook by means of his surveying parties to prosecute the work with diligence, to ascertain the number of acres for which he should pay; that, without fault or procurement upon his part, persons residing within the exterior lines of the patent, in actual possession, and claiming a title thereto adversely to the Williamson-Dils title, were hostile and threatening, and by threats and hostile demonstrations by force and with arms alarmed, intimidated, and drove the surveying parties from the land; that that condition prevailed until the answer was filed in this action; and that, by reason of such threats and demonstrations by the residents in possession, it was impossible to secure a survey of the land, to ascertain the acreage in which Dils had an interest, and for which appellant was to pay under the terms of the contract. It is

further averred in the answer that more than half of the land was covered by prior surveys, and that about 7,000 acres of it were held under junior patents, under which the patentees had taken possession, and were then claiming the land. There were other averments in the answer, which are not necessary to be stated here.

The testimony offered by the appellant conduces to prove that he undertook, in good faith, to have the survey made; that he prosecuted it with reasonable diligence; that he was engaged for a period of about six months in his efforts to make a survey of the land as contemplated by the contract; that the parties living within the boundaries were hostile to his claim, and by threats and intimidation prevented the surveyors from completing the work; and that these threats and demonstrations of force compelled his surveying parties to quit the work, and for that reason did not complete it. Under such circumstances, should the court decree a specific performance of the contract? It is a rule in equity that specific executions of contracts is not a matter of absolute right in either party, but upon the reasonable discretion of the court, and, unless it is equitable to do so, courts will not adjudge it. *Cocanougher v. Green*, 93 Ky., 519, 14 R., 507, 20 S. W., 542; *Woollums v. Horsley*, 93 Ky., 582, 14 R., 642; 20 S. W., 781. It is evident that the parties to this contract did not contemplate that such an obstacle would confront appellant in making the survey as did when he attempted to make it. Had the parties known that it would probably result in loss of life or bloodshed to ascertain the number of acres which the appellant purchased from Dils, it is certain that they would never have entered into the contract; hence we say that neither of the parties had in contemplation such a condition of affairs as arose. The appellant was advised by his friends not to go upon the land, as he

would be in great danger of losing his life if he did so. He was not required to make such a sacrifice to carry out the undertaking which he had assumed. Neither could he be held responsible because his undertaking was rendered impossible by reason of a threatened danger to those to whom he was compelled to look for the execution of the work. But the plaintiff evidently realized the situation, because in his petition he asked that the land be surveyed at the expense of the appellant, but he seems never to have moved the court to comply with the prayer of his petition by making an order of survey in the case. The appellant did not do it, because his surveying parties had spent almost six months in the field, and had failed to accomplish it. It is suggested that the court could have made an order of survey, and called upon the officers of the law to protect the surveying parties. Neither side seemed to be willing to venture such an effort, as no motion was made for an order of survey. When the appellant did not accomplish it in the effort which he made, we are of the opinion that he did all which good faith required him to do to comply with the provisions of the contract, which obligated him to make a survey of the land at his expense. Specific performance will not be decreed if the contract and situation of the parties be such that the remedy of specific performance will be harsh or oppressive. Pomeroy, Equity Jurisprudence, section 1405. In explanation of this doctrine in note 2 to that section it is said: "This rule generally operates in favor of defendant, but may be invoked by a plaintiff when defendant demands the remedy by counterclaim or cross-complaint. The oppression or hardship may result from unconscionable provisions of the contract itself, or it may result from the situation of the parties. unconnected with the terms of the contract, or with the circumstances of its negotiation and execution;

that is, from external facts or events or circumstances which control or affect the situation of the defendant." The resistance made by occupying claimants to a survey of the land is a circumstance which so affects the appellant that he could not perform that part of the contract which required him to have the land surveyed. If he could not do so in the usual and peaceable way, the court should not decree that he should have done so.

It is urged by counsel for appellee that, as Dils was only required to make a quitclaim deed to Williamson for his interest in the land, therefore he was compelled to accept whatever title Dils had. The parties agreed that the actual number of acres in which Dils had an interest should be ascertained before Williamson was required to pay for the land or accept any kind of a deed. As we have said, the sale was by the acre, and the appellant encountered the same difficulty in the execution of the survey as he would have encountered had the contract required Dils to make a deed with covenants of general warranty. From our view of the case, the character of the deed to be made has nothing to do with it. While Williamson was to accept a quitclaim deed, Dils was never in a condition to tender it to him until the number of acres for which he was required to pay had been ascertained. It would be harsh and oppressive to decree specific performance under the circumstances of this case. The court below decreed specific performance, but, in order to do so, was compelled to practically guess at the quantity of land for which the appellant should pay. The contract of the parties did not contemplate that a court should be required to do that, in order to ascertain the number of acres for which the appellant should pay the vendor. We are of the opinion that the contract should be

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rescinded, and the money which Williamson has paid on the purchase money should be restored to him, but not to draw interest until the mandate is filed below.

Judgment is reversed for proceedings consistent with this opinion.

Petition for rehearing by appellee overruled.

CASE 109—ACTION BY W. E. MATTHEWS AGAINST ILLINOIS CENTRAL RY. CO. TO RECOVER DAMAGES FOR BAGGAGE INJURED.—FEB. 25.

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APPEAL FROM HICKMAN CIRCUIT COURT.

JUDGMENT FOR PLAINTIFF AND DEFENDANT APPEALS. REVERSED.

CARRIERS—WHAT CONSTITUTES BAGGAGE—ACTION FOR DAMAGES—PARTIES.

- Held: 1. Under Kentucky Statutes, section 783, providing that every company shall check every parcel of "baggage" taken for transportation, a company is only liable as a carrier for what the passenger takes with him for his own personal use and convenience, unless the company by contract, express or implied, has accepted other articles as baggage.
2. The paying of overweight charges on baggage is not of itself such notice to the company that the trunk contains merchandise, or other articles than the passenger's ordinary baggage, as will render the company liable as a carrier for such articles.
3. Where a traveler is not the owner of goods which he checks as baggage, but is liable to such owner for any loss or damage to them, he may be treated as their owner for the purposes of an action against the carrier for damage to such goods in its hands.

PIRTLE & TRABUE AND J. M. DICKINSON, FOR APPELLANT.

POINTS AND AUTHORITIES.

1. Irrespective of the instructions, plaintiff's case is refuted by admissions in his reply, and by his own testimony that he shipped the merchandise of other persons as his personal baggage.

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2. A passenger can not carry other persons' property as baggage. *Dunlap v. I. S. Co.*, 98 Mass., 371; *Miss. Cen. R. Co. v. Kennedy*, 41 Miss., 671; *Pettigrew v. Barnum*, 11 Md., 449; *Doyle v. Kiser*, 6 Ind., 242; *Pardee v. Drew*, 25 Wend., 460.

Merchandise is not baggage, except sometimes drummers' samples. *Humphreys v. Perry*, 148 U. S., 647.

The authorities established that a passenger has no right to carry other peoples' goods at the risk of the carrier. If others desire their goods carried they must pay for them in the usual way. *Dunlap v. I. S. Co.*, 98 Miss., 371; *Miss. Cen. R. Co. v. Kennedy*, 41 Miss., 671; *Pettigrew v. Barnum*, 11 Md., 449; *Doyle v. Kiser*, 6 Ind., 242; *Pardee v. Drew*, 25 Wend., 460.

If the case of a drummer with samples were accepted as an exception to this rule, this case would not be within the exception for merchandise of other persons can not by a passenger be carried for sale by intermingling with the same goods some samples. We, therefore, respectfully ask a reversal.

J. W. BENNETT, ATTORNEY FOR APPELLEES.

It is contended by appellees that the defendant, Illinois Central Railroad Company, as established by the evidence, received the trunks and goods and instruments of plaintiffs, which are sued for in this action, at Martin, Tennessee, and for pay agreed to transport them to Clinton, Kentucky, and that after defendant had taken charge of said trunks and goods and loaded them on its car at Martin, Tennessee, it was the duty of defendant to take care of said trunks and goods and deliver them at place of destination, to-wit, Clinton, Kentucky, but on account of the negligence and carelessness of defendant's agents and servants said trunks and goods were put off of the car at Fulton, Kentucky, and left there in the rain all night, and until 8 or 9 o'clock next morning, and by so doing the defendant is responsible to plaintiffs for all damage done to trunks and goods. The defendant does not offer any excuse for putting the trunks and goods off of its car at Fulton, Kentucky, and leaving them out in the rain all night, but if the evidence shows it to be on account of the gross negligence and carelessness of defendant's agents and servants, then defendant must pay plaintiffs for damage done to trunks and goods on account of such negligence and carelessness.

Defendant contends that because the plaintiff, W. E. Matthews, was a drummer, and his trunks contained samples of merchandise which were checked as baggage; that it is not liable for damage done to goods unless defendant had knowledge as to the kind of goods the trunks contained.

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The evidence shows that the defendant's agent who checked and handled these trunks at Martin, Tennessee, when he took hold of them and lifted them asked the plaintiff, W. E. Matthews, what was in the trunks that made them so heavy, and that said Matthews told him there were dental goods and instruments in the trunks. The witness for defendant, the defendant's agent at Martin, Tennessee, says that it is the custom of defendant to ship drummers' trunks containing samples of merchandise as baggage, whether the drummer has one trunk or a dozen, and charge for the extra weight of trunks.

If the evidence shows that plaintiff, W. E. Matthews, informed defendant's agent what was in the trunks; it shows that it is the custom of defendant to ship drummers' trunks containing merchandise, and charge for the extra weight of trunks, and that said W. E. Matthews paid for the extra weight of his trunks as other drummers were required to do, and that he was only a drummer, then the court did right in refusing to give instruction "A," which was offered by defendant; defendant has nothing of which to complain.

Wherefore the appellees earnestly ask this court to affirm the judgment of the lower court in this case.

OPINION OF THE COURT BY JUDGE O'REAR—REVERSING.

Appellee was a traveling salesman or drummer for certain wholesale dealers in dental instruments. He bought a ticket and took passage on one of appellant's trains, and had his trunk checked for transmission by that train to his point of destination. The trunk was heavier than was allowed as free baggage to one passenger, and appellee was required and did pay 60 cents extra as overweight charges. The trunk contained about \$1,700 worth of dental goods—steel instruments, presumably. These goods were used not only as samples by which other goods of a like quality were sold for future shipment, but they were sold from the stock in custody of appellee, and then delivered by him to the customers, if they so desired. The goods belonged to appellee's employers, the wholesalers. While the trunk was in appellant's possession, it got wet and the instruments were damaged by rust, it is claimed, to the extent of about

\$500. There was evidence for appellee that when the trunk was being loaded on the train, the person handling it (whether a porter, roustabout, or baggage master, or whether connected with the railroad, he did not know) remarked as to its extraordinary weight, and that appellee replied that it contained dental instruments. For appellant, its baggage master at the station at which the trunk was checked and shipped testified that he was in sole charge of the checking of baggage at that station, and that he was not apprised of the nature of the contents of the trunk; but that it was customary with that road to ship drummers' sample trunks as baggage. The cause of the damage, and the extent of it, do not seem to be controverted by the proof. On this state of case, the court gave the jury the following instructions: "No. 1. The court instructs the jury that if they believe from the evidence the defendant, while the plaintiff's trunks were in its custody, left them exposed to rain, and that said trunks or contents became wet, and thereby damaged, they should find for the plaintiffs the actual damages which said trunks or merchandise therein sustained by reason of such injury, not exceeding the sum set out therefor in the petition. No. 2. If the jury believe from the evidence the plaintiff's trunk, while in the custody and care of the defendant, was bursted or torn in handling, through the negligence or carelessness of the defendant's agents or servants, and that it was thereby damaged, they will find for the plaintiffs such damages as they sustained for this injury to their trunks, not exceeding the sum claimed therefor in the petition." Appellant asked for this instruction, which was refused: "The court instructs the jury that if they believe from the evidence that the trunks shipped by plaintiff contained merchandise which he was carrying for sale, and said merchandise was checked as

baggage on the passenger cars by defendant, and at the time of said shipment plaintiff failed to make known to the agent of defendant who checked said baggage, or other agent authorized to ship and have said baggage checked and shipped on its passenger trains, the law is for the defendant, and the jury should so find." From a verdict and judgment in favor of appellee for \$531.50 damages, this appeal is prosecuted.

The first instruction given to the jury assumes as a matter of law that the common carrier is accountable, under its liability as carrier, for all damage to the contents of trunks shipped as baggage, without reference to the nature or ownership of such contents, and regardless of the carrier's knowledge or notice or agreement as to such contents. The second instruction is not questioned on this appeal. The only legislation in this State on the subject of baggage is that found in section 783, Kentucky Statutes, as follows: "Every company shall furnish sufficient accommodation for the transportation of all such passengers and property as shall, within a reasonable time previous thereto, offer, or be offered, for transportation, at places established by the corporation for receiving and discharging passengers and freight, and shall, when requested, check every parcel of baggage taken for transportation, if there is a handle, loop, or fixture, so that the same can be attached, and shall give to the person delivering such baggage a check for the same." We are thus left to determine what is meant by the term "baggage" by reference to the common law. A very considerable number of adjudications have been rendered on this subject, as might naturally be expected. From them it may be stated that the word "baggage," as used in the connection under discussion, refers only to what the passenger takes with him for his own personal use and convenience, and

which he has committed to the care of the carrier. Generally, the articles allowed as baggage to accompany the passenger, and which the carrier is bound to transmit as an insurer, are the personal apparel of the passenger, but they may include a number of other articles, which may not unreasonably be designed for his pleasure, business, or convenience upon the journey which he is prosecuting. "In a general sense, it may be said to include such articles as it is usual for persons traveling to take with them for their pleasure, convenience, and comfort, according to the habits and wants of the class to which they belong." *Oakes v. N. P. R. R. Co.*, 20 Or., 392, 26 Pac., 230, 12 L. R. A., 318, 23 Am. St. Rep., 126. Story on Bailments, section 499, thus states it: "By 'baggage' we are to understand such articles of necessity or personal convenience as are usually carried by passengers for their personal use; and not merchandise or other valuables, although carried in the trunks of passengers, which are not designed for any such use, but for other purposes, such as sale or the like." *Bomar v. Maxwell*, 9 Humph., 624, 51 Am. Dec., 682; *Macrow v. Great Western Ry. Co.*, L. R., 6 Q. B., 612. Rorer on Railroads, 988, states it this way: "It is difficult to enumerate the articles that may be included, in each particular case, in the term 'baggage.' This depends much on the condition, habits, and circumstances of life of the passenger. Ordinarily, it includes a trunk or trunks, with the necessary wearing apparel for both comfort and dress suitable to the condition in life of the person; . . . but not money in larger amount than for necessary expenses, nor articles of merchandise, or of virtu. . . ." As, ordinarily, only the wearing apparel and similar kindred articles are included in the personal baggage of the traveler, the carrier knows the probable extent of his liability in the event of the loss or damage of the

baggage, and may reasonably be presumed to have regulated his charges and provided means for its safe-keeping proportioned to that liability. If, on the other hand, the passenger might include in his parcel valuable jewels, not properly classed as baggage, or plate, or merchandise, bonds, or money, of many thousands of dollars in value, and the carrier made liable for its loss without knowledge or notice of its extraordinary value, he is compelled to assume a responsibility for which he has not been paid in fact, and without an opportunity to provide that extraordinary care and attention which, by common prudence, would be due to such a valuable charge. Baggage, to a certain reasonable limit, and belonging to a passenger, is carried free, as an incident of the passenger's contract for passage. The common-law definition of baggage forms a part of the carrier's undertaking as though expressly stated and assented to at the time of the passage. The parties may, of course, vary this contract by agreement. If the carrier elects to receive and transport that as baggage which in fact is freight, and which it would have the right to refuse to take as baggage on its passenger trains, it ought to be liable therefor upon the same terms as if it were baggage. But this is not because of its common-law liability therefor, but because it has agreed by special contract for a consideration to be so bound. The elements of such a contract are sufficiently satisfied by an acceptance of the package or trunk by the carrier for transportation as baggage, with knowledge of its contents. *Hutchinson on Carriers*, sec. 685 (1st Ed.); *Texas, etc., R. R. Co. v. Capps*, 2 Willson, Civ. Cas. Ct. App., sec. 33; *Jacobs v. Tutt* (C. C.) 33 Fed., 412; *Central Trust Co. of New York v. Wabash, St. L. & P. Ry. Co.* (C. C.) 39 Fed., 417; *Humphreys v. Perry*, 148 U. S., 627, 13 Sup.

CL, 711, 37 L. Ed., 587. The fact that the passenger paid for the extra weight of the trunk does not vary the rule; for, if the trunk or trunks contained enough of those articles clearly entitled to be classed as personal baggage of the passenger as to be over the weight allowed, and reasonably allowable, to each passenger for free carriage, he would have to pay a just compensation for its being carried. This fact alone is not notice that the package contains anything besides the usual articles entitled to be taken as personal baggage, the nature and probable value of which are generally well known. The carrier might refuse to carry on its passenger train articles not properly baggage. It could not be required to carry freight on passenger trains. Delivering to the carrier a trunk or closed package, ostensibly ordinary baggage, without a statement as to its contents, is equivalent to a representation by the passenger that it belongs to him, and contains only such articles as are properly classed as personal baggage. *Haines v. Chicago, etc., Ry.*, 29 Minn., 160, 12 N. W., 447, 43 Am. Rep., 199; *Michigan Central R. R. Co. v. Carrow*, 73 Ill., 348, 24 Am. Rep., 248. If it contains other articles, and the carrier is not informed of the fact, it is a deception upon the carrier as to such articles, and as to such they are not covered by the carrier's contract. *Story on Bailments* (9th Ed.) sec. 565. In the event of loss of or damage to such articles while in the carrier's possession, without notice of their character when received and checked as baggage, or without a special agreement with reference thereto, it is not liable, except as in a case of a bailee without hire. But notice in terms of the contents of the trunks is not required. It is sufficient if, from all the circumstances of the case, the jury may reasonably infer that the carrier's agent charged with the duty of receiving and checking baggage over its lines knew of the extraordin-

ary contents of the package when he received it and checked it as baggage for the passenger; that is, knew that they contained merchandise or other articles than the traveler's wearing apparel. *Sloman v. Great Western Ry. Co.*, 67 N. Y., 208; *Brown v. Camden, etc., Ry. Co.*, 83 Pa., 316.

While it is true that a carrier can not be made liable for the goods of another than the passenger or a member of his family traveling with him, which may be included in the passenger's baggage, yet the facts in this case tend to show that, although the goods belonged to the wholesale merchants, by an agreement between them and appellee, he had such an interest in them, by reason of his being responsible to them for their loss or damage and required to replace them in such event, that they may fairly be treated as his for the purposes of this action. The damage fell upon him. They were being carried for him. He was the passenger. We therefore conclude that the court erred in assuming appellant's liability for the damage to the dental instruments shipped as baggage.

The judgment is reversed, and cause remanded for a new trial under proceedings consistent herewith.

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CASE 110—MOTION OF LOUISVILLE RY. CO. AGAINST HERMAN ALBIN
FOR JUDGMENT ON A BOND FOR COSTS.—MARCH 12, 1902.

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APPEAL FROM JEFFERSON CIRCUIT COURT.

JUDGMENT FOR PLAINTIFF AND DEFENDANT APPEALS. REVERSED.

STENOGRAPHERS—TRANSCRIPT OF NOTES—TAXATION OF FEE AS COSTS.

Held: 1. Under Kentucky Statutes, section 4639, requiring the official stenographer, upon direction of the judge, either upon his own motion or upon the motion of either party, to take stenographic notes of the testimony in an action, "and upon the motion of either party," to cause a full transcript of the same to be made, the fee of the stenographer for such transcript can not be taxed as a part of the costs against the unsuccessful party, unless the transcript was made by order of the court.

MATT O'DOHERTY, FOR APPELLANT.

The main question by this appeal is whether or not the appellee could rightfully require the appellant who was surety on the bond for costs, to pay the costs of the stenographic transcript of the evidence amounting to \$92.60 and a partial transcript amounting to \$7.20. Our contention is (1) that these costs were needlessly incurred by the appellee and can not for that reason be charged to the appellant, and (2) that the stenographer was never ordered by the court to make a transcript of the evidence. It was made without any authority and can not therefore, under the statute, be taxed as cost at all.

The appellee moved for judgment upon the bond, and appellant filed his answer to the notice and motion for judgment, in which he challenged the correctness of the taxation of costs by the clerk, and set up specifically that there was included in the taxation of \$222.70, the sum of \$92 costs of the stenographic report of the evidence at the first trial, and that said transcript was not made by or in obedience to any order of the court, and that no order to the stenographer to transcribe the notes of the evidence was ever made, and that same was made solely at the instance and for the convenience of the defendant, and that said expense was needlessly incurred and is no part of the costs of the proceeding.

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There was no reply to the answer, and the facts stated were, therefore, confessed to be true.

Our second contention is that the statute, section 4639, expressly provides *when* the stenographic notes of the evidence may be transcribed, *and it is only when this has been done pursuant to the statute that the fees of the stenographer for making the transcript can be taxed as costs.* Until it is ordered by the court there is no authority found in the statute for imposing the fee for making it on any one but the party ordering it. Ky. Stats., sec. 4639.

FAIRLEIGH, STRAUS & EAGLES, FOR APPELLEES.

It is the well-established rule of this court that if upon the hearing of the appeal on a partial transcript it appears that portions of either the pleadings or evidence bearing upon the question have been omitted from the transcript, the appellant court must presume that they would sustain the action of the lower court.

Therefore, even if the very technical construction of section 4639 obtain, yet this court is bound to presume that the defendant in the trial court moved the court to cause the stenographer to make a complete transcript of the testimony.

It appears from the record before you that the fees were taxed "as part of the costs of the proceeding;" then this court must presume from this partial record that the fees were properly fixed by the judge.

The trial court signed and approved both the bill of exceptions and the transcript of the testimony, and all that was necessary to have been done must be presumed to have been done.

MATT O'DOHERTY, FOR APPELLANT UPON PETITION FOR REHEARING.

The appellant in this case is certainly playing in hard luck. The lower court decided the facts in his favor, but the law against him, holding that the cost of the stenographic transcript was chargeable against him, although it had not been ordered by the court, and this honorable court has decided the law in his favor, but without any evidence, has determined the fact against him, that the court below did order the transcript to be made, or at least that it must be presumed that such is the case. We quote from the opinion: "Section 4639, Kentucky Statutes, seems to sustain appellant's contention that an order of court was necessary in order to authorize the said \$92, to be included in the taxation. But the presumption would seem to be that such order was made else it would not have been included in the execution issued, and as neither fraud or mistake as to the issual

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of the execution is alleged in the answer, we are inclined to the opinion that the answer was insufficient."

It was distinctly alleged in the answer of the appellant that the stenographic transcript was not made by, or in obedience to any order of court, and this fact, which was clearly apparent upon the face of the record, *was confessed by appellee's demurrer to the answer*. The appellant was not a party to the original action. He was merely surety upon the bond of the plaintiff in that suit. The proceeding here was a summary one against him by motion authorized by the code. He filed his answer, as he had the right to do, stating the facts upon which he relied, and these facts were confessed by appellee's demurrer. The proceeding against him was not instituted on the execution nor by virtue of it. It was a motion against him for the costs which the clerk had taxed and for which the clerk had issued an execution. It was incumbent upon the appellee in moving for judgment against the sureties to show its right to the costs claimed. This was the very thing which the appellant distinctly alleged had not been done. How, then, can any presumption be indulged that it was done?

We think, therefore, the surety on the bond ought not to be thus mulcted, and that no liability beyond what the law clearly imposes should be allowed to rest upon him. We ask that the court reconsider its ruling in this case and that a rehearing be granted and the judgment appealed from reversed. *Brunnel v. Thompson*, 12 Bush, 116.

REHEARING GRANTED FORMER OPINION WITHDRAWN.

OPINION OF THE COURT BY CHIEF JUSTICE GUFFY—REVERSING.

The appellee, upon notice duly executed, moved the circuit court of Jefferson county, common pleas division, for a judgment against the appellant for \$222.70, based upon his liability as surety on a bond for cost in the suit of the Kansas City Land Company against the Louisville Railway Company. The substance of the defendant's answer is a denial that the cost of the case had been duly taxed by the clerk of the court, or that the amount was the sum of \$222.70. It is further alleged that there is included in said taxation of costs the sum of \$92, alleged to have been paid by plaintiff for a stenographic report of the evidence at

the first trial of this case; that the stenographic transcript was not made by or in obedience to any order of the court; that it was made at the instance and for the accommodation and convenience of defendant in preparing its bill of exceptions at its first trial; that it was needlessly incurred; and that no appeal could have been successfully prosecuted, and that the case was finally decided in favor of the railway company. The court sustained appellee's demurrer to the answer, and rendered judgment for the amount claimed, and, appellant's motion for a new trial having been overruled, he prosecutes this appeal.

It is insisted for appellant that, as there was no order of court directing the transcribing of the stenographic notes, the fee therefor, \$92, was not legally taxable against the party plaintiff in the original suit; or, in other words, no judgment was ever rendered for that sum, though the same was included in the execution issued upon the judgment rendered. Section 4639, Kentucky Statutes, reads as follows: "Upon any trial or proceeding in any civil case in said court or division, if either party to the suit, or their attorney, shall request the services of said reporter, or if, in the opinion of the presiding judge, the testimony should be preserved, the presiding judge shall direct such reporter to make a full report of the testimony heard therein, whereupon it shall be the duty of the reporter to take full stenographic notes of such testimony, and upon the motion of either party to the suit or proceeding, or their attorney, to cause a full and accurate transcript of the same to be made, which shall be filed among the papers to be used in making up the bill of exceptions to the court of appeals." It is the contention of appellee that either party may apply to the stenographer for a transcript of the evidence, and that the cost thereof shall be taxed as ordinary cost of the

suit. The contention of appellant is that no charge for such transcript could be taxed as cost against him unless the same was ordered by the court to be made out. It will be seen by an examination of the section, *supra*, that all the services as well as the appointment of the reporter shall be made by the court on motion or on his own motion. After the appointment of the reporter, it is his duty to take full stenographic notes of the testimony. It is also provided that upon motion of either party an accurate transcript of the testimony shall be made. If we carefully examine and analyze the section, we find that, if either party requests the services of a reporter, or if the judge is of the opinion that the testimony should be preserved, the reporter shall be directed, etc., whereupon it shall be the duty of the reporter to take full stenographic reports of the testimony; and then follow the words, "and upon the motion," etc. Manifestly the motion is made to the court. The entire question of appointment of the reporter is under the control of the court, and it seems clear that the duties of the reporter, in the absence of a statute, should be controlled by the court. If we omit from the section all commencing with the word "whereupon" and ending with the word "testimony," the section would still be complete. It would then in substance provide for the appointment of a stenographer, and what should be done, all of which must be ordered on motion—evidently on motion made to the court. The succeeding section (4630) seems to sustain the contention of appellant, for in said section it still more clearly appears that the entire question of making a transcript of the evidence is to be done by order of the court. After a careful consideration of the law, we are of opinion that under section 4639 the costs of a transcript of the stenographer's notes can not

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be taxed as cost against the unsuccessful party, unless such transcript is ordered by the court to be made. It results from the foregoing that the court erred in sustaining the demurrer to appellant's answer.

The judgment is reversed, and cause remanded, with direction to overrule the demurrer, and for proceedings consistent herewith.

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ASSIGNMENT FOR CREDITORS—

1. Contingent Remainder.—A contingent remainder in land is a vendible estate, and in a deed of assignment of "all real and personal estate of every description," such estate passed to the assignee whether the parties believed it so passed or not. *McAllister v. Ohio Banking & Trust Co.*540
2. Sufficiency of Deed.—Under Kentucky Statutes, section 75, providing that a deed of assignment for benefit of creditors "shall vest in the assignee the title to all the estate, real and personal of the assignor," and section 2341, providing that any interest in or claims to real estate may be disposed of by deed or will in writing," a deed of assignment, which, after specifically naming certain property, real and personal, contained these words: "Also all other real and personal estate of every description owned by the assignor," was sufficient to pass a contingent remainder in land. *Idem.*541
3. Death of Assignor—Discharge of Assignee—Appointment of Receiver.—Neither the death of one who makes the assignment for the benefit of creditors, nor an order of the court discharging the assignees from further connection with the trust estate and releasing their sureties from further liability, revokes the trust or deprives the creditors of any right they acquired by the assignment, but on petition of a creditor a receiver will be appointed to look after and apply the assets which have not been collected. *Andrews et als. v. Wilson's Assignees*671
4. Sale of Bank Books.—The bank books of a banker who has made an assignment for creditors and which are the evidence of the assets of the trust estate, should not themselves be sold. *Idem.* 672

ASYLUMS—

Authority to Make Insurance—Certifying Premiums to Auditor.—Under Kentucky Statutes, sections 224, 233, it is the duty of the board of commissioners to contract for insurance for a State insane asylum, and for the superintendent to certify the amount of premiums to the State Auditor. *Furnish v. Satterwhite, &c.*905

ATTORNEYS. (See Decedent's Estates, 1, 2.)

1. Disbarment Proceeding—Jurisdiction.—Constitution, section 137, constitutes each county having a certain population a judicial district with several judges, requires each of the judges to hold a separate court, except when a general term may be held, and provides that criminal cases shall be under the exclusive juris-

Attorneys.

ATTORNEYS—Continued.

- diction of some one branch of the court, and all other litigation shall be distributed as equally as may be between the other branches thereof. *Held*, That as a proceeding to disbar an attorney is not a criminal case, and so not within the exclusive jurisdiction of the criminal branch, the chancery branch has jurisdiction thereof. *Commonwealth v. Richie* 366
2. Compensation.—Under Kentucky Statutes, section 3314, providing that a city attorney shall be paid an adequate salary and in addition “ten per cent. on all sums collected by him for the city,” where an action was brought against the city to enjoin the collection of a tax, which action was successfully defended through the State courts by the city attorney, and judgment entered and affirmed on appeal for a penalty against the plaintiff in such action, such attorney was entitled to ten per cent. on the amount of such penalty, but not on the amount of the tax. *Atchison v. City of Owensboro* 706
3. Voluntary Service After Time Expired.—Where an action against a city, successfully defended by the city attorney through the State courts, was appealed to the Supreme Court of the United States, and, after such attorney’s term had expired, he, without the request of the city, went to Washington and assisted his successor in the case, the city was not liable to him for his expenses so incurred, or for such service. *Idem.* 706
4. Same.—Where a city attorney recovered a money judgment for the city in the county and State supreme courts, the fact that the collection was delayed until after his time expired, by an appeal to the Supreme Court of the United States, with *superseas* bond, did not deprive him of his right to ten per cent. of the amount so recovered. *Idem.* 706
5. Claim Against U. S. Government—Minister to Foreign Country—Attorney’s Fee.—Under Revised Statutes, United States, section 5498 (U. S. Comp. St., 1901, p. 3707), prohibiting a person holding a place of trust or profit under the government from acting as agent for the prosecution of a claim against the United States, a person who has entered into a contract with another to assist him in prosecuting the claims of a city against the government, but who shortly afterwards accepts the post of minister to a foreign country, and who holds such post during the prosecution of the claim, can not recover any fee for the prosecution of the claim. *Fox v. Willis, &c.* 941
6. Advancements to Associate Attorney.—Where a minister to a foreign country had, before taking up his duties, entered into a contract with another to assist in the collection of certain claims against the government, which were prosecuted during his

Attorneys—Bills and Notes.

ATTORNEYS—Continued.

term of office, he can, upon payment of the claims, recover from his associate any attorney's fees and costs advanced for his benefit, though he can not recover any fee for his services. *Idem.* 941

7. Reasonable Fee.—An attorney fee of \$500 certain, and \$1,000 additional in case of success, for the collection of a claim of \$19,017.05 by suit, is reasonable. *Idem.*941

BAGGAGE—

See Railroads, 17.

BALLOTS—

See Election Contests.

BANKS—

See Assignment for Creditors.

BENEFIT CERTIFICATES—

See Life Insurance.

BILLS AND NOTES—

1. Accommodation Indorser—Interest Paid by Principal.—Defendant, in order to secure funds to purchase tobacco, was in the habit of drawing a draft on a factor who paid the draft. He then drew a bill of exchange with the factor as drawee and a certain national bank as payee. The factor then accepted and delivered the bill to the bank which credited the factor with the net proceeds, deducting ten or eleven per cent. interest, the bill drawing six per cent. after maturity; and when the factor paid it, charging the whole expense to defendant. *Held*, That defendant drew as an accommodation indorser to the factor and the latter was the principal, and hence interest paid to the bank by the factor was not chargeable to defendant, but he was liable for the legal interest on the original draft until he paid the debt. *Bailey, &c., v. Wood, &c.*28
2. Leaving Blank Space in Note—Alteration by Maker—Liability of Surety.—One who signs a note as surety in which are written the words "five hundred" with spaces before and after them, which the maker fills up by writing "twenty" before and "fifty" after them, thereby making a note for \$2,550, is liable thereon to a bona fide purchaser. *Hackett v. First Nat. Bank of Louisville*193
3. Noting of Protest.—The words "protested for nonpayment" indorsed by a notary on a bill of exchange, and in addition the day of the month and the year and signed by the notary, is a sufficient noting of protest. *Moreland's Admr., &c., v. Citizen's National Bank*577

Bills and Notes—Conspirators.

BILLS AND NOTES—Continued.

4. Destroying Memorandum on Which Was Noted the Protest.—After the notary had written the instrument of protest he destroyed a slip of paper on which he had noted the protest as a memorandum from which to write the instrument of protest. The destruction of the slip whether done purposely or accidentally, did not invalidate the protest. *Idem.*577
5. Assignment of Drawer Before Bill Matures—Notice.—Though between the drawing and maturity of a bill of exchange the accommodation drawer makes an assignment for the benefit of creditors, notice of protest to him alone is sufficient. *Idem.*..579
6. Omission of Words.—The words in a bill of exchange, "one hundred and eighty days pay to the order of," import it is due 180 days after date. *Idem.*577
7. Exception Waived.—No exception having been filed to the report of the commissioner and no question made as to its correctness, except in the brief in this court, it is too late to raise the question here. *Idem.*577

CEMETERY COMPANY—

See Taxation, 4.

CHALLENGES TO PANEL—

See Criminal Law, 22.

CIPHER CODE—

See Criminal Law, 10.

CIRCUIT COURTS—

See Election Contests, 9.

CIRCUIT JUDGE—

See Criminal Law, 1, 2.

CITY PARKS—

See Municipal Corporations, 4.

COMPROMISE—

See Pleading

COMPULSORY PROCESS—

See Criminal Law, 22.

CONSIDERATION—

See Railroads, 16.

CONSPIRATORS—

See Criminal Law.

Constitutional Law—Costs.

CONSTITUTIONAL LAW—

See Counties, 2; Salaries, 3; Taxation, 14.

CONTINGENT REMAINDER—

See Assignment for Creditors, 1.

CONTINUANCES—

See Criminal Law, 21, 22, 34.

CONTRACT—

1. Building Hitching Rack in Public Square—Liability for Removal—Nuisance.—Where plaintiff, a county, contracted with defendant city that in consideration of plaintiff's agreement to build a fence and a good brick pavement on certain land surrounding defendant's public square, and its surrender of such land, plaintiff should be granted the privilege of erecting hitching racks on the same, and be entitled to perpetually maintain the same, which it did for seventeen years without interruption, when, by reason of the growth of the city, the racks became a nuisance and defendant forcibly removed them, plaintiff was not entitled to recover therefor. *Mercer County v. City of Harrodsburg*851
2. Specific Performance—Involving Hardship and Oppression.—A contract for the sale of an undivided interest in land provided that the land was to be surveyed by the vendee at his expense; that when the amount thereof was ascertained the vendee should pay a certain price per acre for the vendor's undivided interest, and the vendor should make a quit claim deed. The vendee attempted to survey the land, but his surveyors were prevented by force from doing so, the vendee being advised that he would be in great danger of being killed if he went on the premises. *Held*, That as the contract could not be performed until the number of acres was ascertained by survey, and as this could not be done without great hardship to the vendee, specific performance would not be enforced. *Williamson v. Dila*962

CONTRIBUTORY NEGLIGENCE—

See Railroads, 3; Streets, 1, 2.

CORRUPTION FUND—

See Illegal Contracts.

CREDITOR—

See Fraudulent Conveyances, 2.

COSTS—

See Wills, 15; Administrators, 3.

Counties—County Judges.

COUNTIES—

1. Indebtedness—Guards Summoned to Protect Property—Number.—Discretion of Sheriff.—Under Kentucky Statutes, section 1241a, authorizing the county judge to order the sheriff or any constable to summon a posse of not less than two nor more than ten men to guard certain property, the discretion of determining the number of men within the specified limits of which the party shall consist, is vested in the sheriff, and the order properly left the number of posse indeterminate. *Hopkins County, &c., v. St. Bernard Coal Co., &c.*153
2. Constitutional Law—Improvident Contracts—Necessary Expenses of Government.—Kentucky Statutes, section 1241a, authorizes the county or circuit judge to order the sheriff to summon a posse to guard property threatened with mob violence, and provides for the payment of the wages of such guards from the county treasury. Constitution, section 157, provides that no county shall become indebted for any purpose to an amount exceeding in any year the income provided for such year without the assent of two-thirds of the voters. *Held*, That the constitutional prohibition referred only to improvident contracts voluntarily entered into by the county, and not to necessary expenses of government, and did not render section 1241a void. *Idem.*153
3. Affidavit—Recitals in Order—Presumption.—No objection having been made, in the court below on the ground that no affidavit was filed before the county judge on which to base the order for the guards, and as the order of the court recites the facts, it should be presumed that the recitals are true in the absence of an express denial and proof to the contrary. *Idem.*.....153
4. Assignment of Claim—Ultra Vires.—Where an action against a county to recover compensation under Kentucky Statutes, section 1241a, for guarding property threatened by mob violence, was brought by the original claimants together with a corporation to which they had assigned their claims, an objection that the purchase of the claims by the corporation was “ultra vires” was without merit, because as the original claimants were before the court and would have received the money, the county was not prejudiced by a judgment in favor of the corporation. *Idem.*153

COUNTY JUDGES—

1. Liability For Failing to Take Sufficient Surety on Guardian's Bonds.—Kentucky Statutes, section 2017, requires a guardian to execute a bond before acting, and section 2018 provides that if the court fails to take such covenant or accept such sureties

County Judges—Criminal Law.

COUNTY JUDGES—Continued.

as do not satisfy it of their sufficiency, the judge so in default and his sureties shall be liable to the ward for any damages he may sustain thereby. *Held*, That though the judge is only required to use reasonable care to ascertain that the sureties are sufficient, he is absolutely bound to know that surety of some kind to the covenant is actually taken, and if he accepts a bond to which the signature of the surety has been affixed under a power of attorney, not legally authenticated he is liable for the resulting damages. *Best, &c., v. Robinson, &c.* (two cases)....11

CRIMINAL LAW—

1. Disqualification of Trial Judge—Sufficiency of Affidavit—Kentucky Statutes, section 968, provides that if either party shall file his affidavit that the judge will not afford him a fair and impartial trial, the judge shall vacate the bench for that case in favor of an attorney to be selected to try the cause. *Held*, That where an affidavit states that the judge will not give the litigant a fair and impartial trial, and sets out as the basis of such belief facts such as would prevent an official of personal integrity from presiding in the case or from affording a fair and impartial trial, it must be assumed that such facts are true, and the judge must accordingly vacate. *Powers v. Commonwealth* (2d trial)237
2. Same.—Defendant having been indicted as an accessory before the fact of a murder alleged to have been committed as a part of a political conspiracy, filed his affidavit that the judge was a member of the same political party as deceased, and was his intimate personal friend, and in close sympathy with him in the political imbroglio resulting in the assassination; that by reason thereof, and of the great excitement at the time of the assassination the judge had conceived a feeling of hostility against defendant which would prevent him from affording a fair and impartial trial of the case; that at a former trial the judge had shown his hostility by specific acts, especially in the selection of an unfair and prejudiced jury. *Held*, That sufficient was alleged to require the judge to vacate the bench on motion, under Kentucky Statutes, section 968. *Idem.*237
3. Conspirators—Statements of.—Defendant was charged with being an accessory before the fact of murder, and it was sought to show that a large body of citizens who were assembled at the State capital by the instigators of defendant and others, were there to intimidate by force the Legislature while acting as the triers of certain election contests, and that in execution of such purpose the murder was committed. *Held*, That testimony as

Criminal Law.

CRIMINAL LAW—Continued.

- to what members of the party said and did while at the capital was competent. *Idem.*238
4. Same.—Testimony as to an occurrence at a dinner where one of the party assembled at the capital "sweetened his coffee with a forty-four," was competent. *Idem.*238
 5. Same.—Statements by others at the capital not shown to have been acting with the accused or with others indicted with him, were not competent against defendant. *Idem.*238
 6. Same.—The fact that persons visited the Statehouse square during the contest proceedings and had access to those jointly indicted with defendant, was not sufficient to connect them with the alleged plot, so as to render admissible against the defendant statements made by them. *Idem.*238
 7. Same.—The fact that witnesses had information which led them to believe that deceased would be assassinated, did not prove or tend to prove, them parties to the alleged conspiracy, so as to make statements made by them in regard to such information admissible against defendant. *Idem.*238
 8. Telegrams by Alleged Conspirator.—Telegrams sent immediately after the murder by a defendant on trial as an accessory before the fact or by those jointly indicted with him as co-conspirators, or by those acting under the authority of such alleged conspirators, were relevant as against defendant. *Idem.* 238
 9. Intimidation—Political Plot—Armed Forces—Militia—Where it was the theory of the prosecution of an alleged accessory before the fact of the murder of a contestant for the office of Governor, that the murder was a part of a political plot to intimidate the Legislature, as the trier of an election contest involving the governorship, and where the acting governor was indicted jointly with the defendant, acts and telegrams of the acting governor as head of the military department, and of the military department in general which reasonably appeared to be connected with the killing, were admissible against the defendant. *Idem.* 238
 10. Same.—The words, "all right" in telegrams sent directly after the assassination, though having apparently a plain meaning, may, when they constitute a military telegram, be shown by parol to have been used as a part of a cipher code, and to have a meaning different from their face. *Idem.*.....239
 11. Where certain letters written by one charged with a crime were introduced against him it was not competent for him in his testimony to explain unambiguous expressions therein. *Idem.*....239
 12. Same.—The fact that adherents of a defendant charged with crime, over whom he had no control, so treated one who testified against him at his first trial as to compel the witness to move away from

Criminal Law.

CRIMINAL LAW—Continued.

- the vicinity, was not material against defendant at his second trial. *Idem.* 239
13. Same—Evidence was not admissible on the trial of one accused of being accessory before the fact of murder as to what he said several minutes after he knew of the murder. *Idem.* 239
14. The acting governor was indicted as a co-conspirator with defendant, and the prosecution was permitted to prove the use of the militia by him immediately after the murder. *Held*, That it was permissible for the defense to prove as a reason for such use, that angry and excited crowds were gathering about the executive building threatening the occupants thereof with violence. *Idem.* 239
15. While it was permissible for the defense to prove as a reason for being prepared with the militia that they had knowledge of armed forces which assembled near the State House for the purpose of forcibly ejecting the acting governor, and others from their offices, a mere rumor to that effect was properly rejected. *Idem.* 239
16. Impeachment of Witness—Proof of a statement made by a witness out of court, tending to impeach his credibility as a witness should be admitted. *Idem.* 239
17. Same.—The proper mode of impeaching a witness on the ground of a commission of a felony is by proof of conviction thereof. *Idem.* 239
18. Accomplices—Credibility and Weight of Evidence.—Those who have been indicted as accomplices in the crime for which a defendant is being tried are competent witnesses against him, though the charge against them has been dismissed; such fact going only to the credibility and weight of their evidence. *Idem.* 239
19. C, a witness for the defense in a criminal action heard G., a witness for the prosecution, make certain statements affecting G.'s credibility. *Held*, That it was immaterial that C., on the same occasion loaned money to G's brother in law. *Idem.* 240
20. A letter suggesting that the Commonwealth's Attorney be apprised that the writer was in possession of information against one jointly indicted with defendant as an accessory before the fact of murder, and a later letter requesting the destruction of the first one, were immaterial, as against defendant though the testimony of the writer was material, and was used against him. *Idem.* 240
21. Postponement of Trial—A mandate of reversal of a criminal case was filed with the clerk more than ten days prior to the term of court, next succeeding the reversal, and notice given the

Criminal Law.

CRIMINAL LAW—Continued.

- defendant that the case would be urged for trial at such term. When court convened, the filing was noted of record. *Held*, That the time given the defendant for preparation being reasonable, nothing to the contrary being shown, the case would stand for trial at that term of the court, though there was no authorization for the filing of the mandate before term time. *Idem*..240
22. Compulsory Process—Criminal Code, Sec. 189, as amended by Act of May 15, 1886, provides, that a continuance may be refused in criminal cases despite the absence of defendant's witnesses without admitting everything as true, which is stated in the expected testimony of the absent witnesses in the affidavit for a continuance, but that such affidavit must be read as their depositions. Bill of Rights, paragraph 2, provides that the accused in a criminal prosecution shall have the right to compulsory process for his witnesses. *Held*, That the trial of a criminal action can be forced on defendant though some of his witnesses are absent where he has been furnished the compulsory process of the court to secure their attendance, and where the affidavit for continuance on account of their absence is allowed to be read as their deposition. *Idem*.....240
23. Night Sessions.—This court when it is not advised as to the condition of the docket of the circuit court, can not hold a refusal of a motion to discontinue night sessions, to have been an abuse of the circuit court's discretion in that regard. *Idem*..240
24. Corroboration of Co-conspirators' Peremptory Instruction.—Where, in a criminal action, there was evidence which if given full credit tended to corroborate the evidence of those charged as co-conspirators with defendant, and to establish his guilt, it was not error to refuse a peremptory instruction to find for the defendant. *Idem*240
25. Challenge to the Panel.—Under Cr. Code, sec. 281, providing that decisions upon challenges to the panel are not subject to exception, the court of appeals has no jurisdiction of an objection to the panel. *Idem*.....240
26. Instructions.—Where defendant was charged with being an accessory before the fact of a murder alleged to have been a part or result of a conspiracy, an instruction in regard to acts done in pursuance of a conspiracy "to do some unlawful act" should have further informed the jury what would have been an unlawful act under the law and the evidence. *Idem*.....241
27. On Petition for Rehearing.—While no provision is made in sections 356, 357, 358, 359, and 360 Criminal Code, regulating appeals, for a rehearing by the defendant in a felony case, and, except in cases expressly provided for by statute, a rehearing

Criminal Law.

CRIMINAL LAW—Continued.

- is not a matter of right, we are of the opinion that this court has by virtue of its appellate jurisdiction in such cases, power to suspend the issual of the mandate and rehear the case during the term at which it is tried. But if the power is not exercised during the term, the decision becomes final, and this court has no jurisdiction at a subsequent term to retry the appeal. *Idem*241
28. Homicide—Conspiracy—Evidence—Instructions.—Where, in a prosecution for homicide a conspiracy is not charged, but the Commonwealth is permitted to introduce evidence that a conspiracy existed, that the accused was a member of it, and that various persons who are claimed to be co-conspirators did acts and made declarations in furtherance thereof, the jury should be told how far and under what circumstances they could consider evidence of the acts and doings of the co-conspirators as evidence against the defendant, on trial, and failure to give any instruction limiting the effect of the evidence of conspiracy is error. *Howard v. Commonwealth*,.....372
29. Good Character.—The court is not required to instruct the jury that the law presumes the accused to be of good character, and that this presumption continues throughout the case, though such instruction may be correct as an abstract proposition. *Idem*373
30. Law Declared on First Appeal.—The rule that the law as declared on the first appeal is the controlling principle in the case, on the second appeal is recognized, but the principle is sharply limited to points necessary to a determination of the case. On questions incidental or not considered on the first appeal, the court is not conclusively bound on the second appeal. *Idem*.....373
31. Homicide—Irrelevant Evidence—Harmless Error.—Defendant in a murder case is not prejudiced by admission of testimony of a quarrel between two other persons in which one said he would kill the other. *Cook v. Commonwealth*.....586
32. Absence of Counsel.—A conviction for murder will not be reversed because a second continuance for, as alleged, the unexpected absence of counsel was not granted, such counsel never having appeared in the case, and the evidence warranting the assumption that nothing more than was done could have been done by the absent counsel. *Idem*.....586
33. Indictment—Omission of Word "Feloniously."—It is too late to question an indictment for murder as not alleging the killing was feloniously committed, on an appeal from a conviction of manslaughter. *Arnett v. Commonwealth*.....593
34. Affidavit for Continuance.—Where an affidavit in support of a

Criminal Law.

CRIMINAL LAW—Continued.

- motion for a continuance of a criminal prosecution failed to state that the witnesses were not absent by accused's consent or procurement, or where they were, or what grounds existed for the expectation that their testimony could be procured, and the facts to be proven would not have been competent, the continuance was properly refused. *Idem.*593
35. Dying Declarations—When Admissible.—A witness giving evidence of a dying declaration in a criminal prosecution testified that decedent said to her several times after he was wounded, that he did not expect to live; that he made the declaration on the day he died, and said in the same conversation that his time was short, and that previous to the declaration he had been gradually sinking for several days. *Held*, To sufficiently show consciousness of impending death. *Idem.*593
36. Wife Competent to Testify to Dying Declarations of Husband.—Civil Code, section 606, provides that the wife shall be incompetent to testify, even after the cessation of the marriage relation, to any communication made to her by her husband during marriage. *Held*, That a wife is competent to testify to her husband's dying declarations in a prosecution of his alleged murderer, notwithstanding this statute. *Idem.*593
37. "Filing Away" an Indictment—Speedy Trial.—Bill of Rights, section 11, provides that in prosecutions by indictment or information accused shall have a speedy trial. Accused was indicted and appeared, and the case was set for trial, and afterwards continued by consent till the next term, accused being released on bail. On being then called for trial the Commonwealth's attorney announced that he was not ready and moved the court to discharge the witnesses and accused from his bond and to file the indictment away, with the right to reinstate it on the Commonwealth's motion. The motion was sustained over accused's objection and insistence on a trial or dismissal. *Held*, Error, as the practice of filing away indictments is not to be indulged where the accused has been served with process and objects to the order. *Jones v. Commonwealth*599
38. Final Order.—An order "filing away" an indictment to be reinstated on the Commonwealth's motion is sufficiently final to be appealable. *Idem.*599
39. Homicide—Insanity—Instructions.—On the trial for murder of defendant's wife there was evidence that on the previous evening, and on numerous occasions running back for several months, defendant had abused and beat her because she did not give him money, and as some witnesses testified, because she did not give him money to buy whisky; that he was without means, idle and

Criminal Law.

CRIMINAL LAW—Continued.

- dissipated, and had done little or no work for several months, while she had worked as a domestic; and that he had frequently threatened to kill her. The court charged that such evidence was admitted solely for the purpose of showing the state of defendant's mind and of his motives, and that the jury should not allow the same to influence their verdict in fixing the punishment if they should, from the other evidence, find the defendant guilty. *Held*, That such instruction was as favorable to defendant as he was entitled to. *McCarty v. Commonwealth*620
40. Condoning Her Infidelity.—Where a husband continued to live with his wife for weeks after having been told of her infidelity, his subsequent act of killing her could not be reasonably attributed to jealous frenzy aroused by a sudden and unexpected revelation of her infidelity. *Idem*.620
41. Unsoundness of Mind.—If defendant's mind was "free from disease, then no impulse to shoot the deceased, no matter how violent and no matter how completely it dominated his will, was unsoundness of mind," so as to excuse the homicide. *Idem*. 620
42. Argument of Counsel—Exceptions.—Where the bill of exceptions in a murder case does not show the remarks made by the attorney for the Commonwealth or that any exceptions were taken thereto, the appellate court can not consider complaints thereof, based on what purports to be a newspaper report of a portion of the remarks. *Idem*.620
43. Malicious Shooting and Wounding With Intent to Kill—Statutory Definition—Instructions Under Common Law.—In a trial of one who is indicted under Kentucky Statutes, section 1166, charging him with "unlawfully, wilfully, and maliciously shooting and wounding another with a deadly weapon with intent to kill," which is a felony, and which covers the minor offense under Kentucky Statutes, section 1242, of shooting and wounding another in a sudden affray or in sudden heat and passion, without previous malice and not in self-defense, "both being statutory offenses, must be tried under the statute and not as a common law offense, and it was error in the trial court in charging the jury to find the defendant guilty if they believed from the evidence he wilfully and maliciously shot and wounded another with intent to kill him not in his apparent self-defense," by adding thereto the words, "and under circumstances reasonably calculated to excite his passions beyond his power of self-control." *Hardin v. Commonwealth*722
44. Homicide—Self-Defense—Instructions.—In a prosecution for murder, an instruction that if at the time defendant killed deceased he was about to do defendant or his brother some great bodily

Criminal Law—Decedent's Estate.

CRIMINAL LAW—Continued.

harm, and that to shoot deceased was necessary or seemed to defendant to be necessary in the exercise of a reasonable judgment, to protect himself or his brother from such injury, "either real or to the defendant apparent," the jury should find defendant not guilty on the ground of self-defense and apparent necessity, was not objectionable on the ground that it required the jury to believe that defendant or his brother "really was in imminent danger of great bodily harm at the hands of deceased, instead of being apparently so." *Reynolds v. Commonwealth*. 912

45. Evidence—Grouping and Emphasizing Facts.—An instruction in a prosecution for murder, on the subject of self-defense, which collects the evidence as to former acts of violence on the part of deceased, and charges that defendant had a right to bear arms openly and keep a lookout for deceased, and that if he casually met him he need not wait to be assaulted, but may consider the past, and if he believes that he is in apparent danger of great bodily harm at decedent's hands he may shoot him, is erroneous, as unnecessarily grouping and emphasizing the facts and giving undue prominence to particular evidence. *Idem*... 912
46. Overruled.—*Oder v. Commonwealth*, 80 Ky., 32; 4 R., 18, is overruled so far as it conflicts with the opinion in this case. *Idem*. 913

DECEDENT'S ESTATES. (See Administrator, 3.)

1. Attorneys' Fees—Suit For Settling the Estate—Mortgage Liens.—Decedent left no personal estate. A mortgagee instituted foreclosure proceedings, making the widow, son, and administrator defendants, and also another creditor. The widow then sold the land and paid all the debts. At the settlement the mortgagee's attorney demanded a fee of \$75; the administrator's attorney one of \$50; and a cost bill of \$19.35 was presented. The mortgagee stated, without contradiction from his attorney, that the latter's fee was to have been \$20; and the administrator denied employing his attorney, though he later, in an affidavit, demanded an allowance of a fee for him. The note secured by the mortgage was proved by affidavit prepared by the holder. An amended petition, containing averments authorizing a reference to a commissioner to settle the estate was not filed till after the payment of the debts. *Held*, That neither attorney was entitled to a fee. *Hall, &c., v. Metcalf* 886
2. Taxation of Costs.—The mortgagee's debt not having been paid till after foreclosure was instituted, he was entitled to costs accruing to the time of payment, including \$5 as an attorney's fee, as is usual in equitable actions. *Idem*. 886

Decedent's Estate—Divorce and Alimony.

DECEDENT'S ESTATES—Continued.

3. Decreeing Sale of Mortgaged Property.—In the foreclosure of a mortgage on a decedent's estate, it appearing that after suit was instituted, a third person placed \$600 in the mortgagee's hands, with which to effect a purchase at commissioners' sale. The third person then bought from the widow and son for \$850, paying them the balance above the \$600. The mortgagee then settled with the third person by returning \$42, having retained enough to pay his mortgage debt and interest, and \$15 in satisfaction of another claim. *Held*, That it was error to decree a sale of the property as the mortgagee's debt had been paid. *Idem*.886

DEEDS—

See Fraudulent Conveyances, 3, 4, 5; Land, 2.

DECRETAL SALE—

See Decedent's Estates, 3.

DESCENT AND DISTRIBUTION—

1. Infants' Real Estate—Rights of Parents.—Ky. Statutes, Sec. 1393, provides that realty of an intestate leaving no children or their descendants, shall go to his father and mother equally; but section 1401 enacts that if an infant dies without issue having title to real estate derived by gift, devise, or descent from one of his parents, the whole shall descend to that one parent. *Held*, That when an infant's title was through deeds from others than a parent the land passed to both parents by section 1393, and not to one by section 1401, though one of the parents may have paid the purchase money. *Guier, &c., v. Bridges*148

DEPOSITIONS—

Taken Without Notice.—It is too late, on appeal, to object to depositions as taken without notice. *Hall &c., v. Metcalf*886

DIVORCE AND ALIMONY—

1. Five Years' Separation—Pleading.—If in an action by the wife for divorce on the ground of five years separation, it is necessary in order to maintain her claim for alimony, that she should allege that the separation was without her fault, her omission of such allegation is cured where the defendant in his answer alleges that the separation was without his fault. *Boreing v. Boreing*.522
2. Domicile of Wife.—A wife living separate from her husband for five years, does not lose her residence in the State of his domicile, for the purpose of an action for divorce, by going into other States to teach and do other work in order to support herself. *Idem*.522

 Divorce and Alimony—Duplicate Tax Bills.

DIVORCE AND ALIMONY—Continued.

3. Competency of Wife as Witness.—A wife is not competent to testify an action brought by her for divorce. *Idem.*522
4. Wife Justified in Leaving.—A wife suing for divorce on the ground of five years separation, was justified in leaving her husband, though he had used no physical violence towards her, and had never stinted her in money matters, where it appeared that his conduct towards her had become so rude and negligent as to make it apparent that she had lost his love and affection, that he was habitually rude to her lady visitors, that he often left home to be gone for several weeks at a time, without ever informing her of his proposed departure, &c. *Idem.*522
5. Alimony.—A wife, who having left her husband on account of his indifference and neglect, obtained a divorce after five years separation, and who was in destitute circumstances and without means of support, was entitled to reasonable alimony. *Idem.*522

DOWER—

See Mortgages, 4.

1. Purchase Money Lien.—Under Rev. St. Ch. 47, Art. 3, Sec. 6, adopted in 1852, now Ky. St., Sec. 2135, providing that a wife should not be endowed of land sold, but not conveyed by the husband before marriage, nor of land sold bona fide after marriage to satisfy a lien or incumbrance created before marriage, or created by deed in which she joined, or to satisfy a lien for purchase money, where the whole of the land was sold under a judgment for the balance of the purchase money due thereon, the wife is not entitled to dower therein, although she was married to her husband prior to the adoption of the Act of 1852. *Helm v. Board, &c.*289
2. Vested Rights of Widow.—The wife's inchoate right of dower is not a vested right in the sense that it is not subject to change or even abolishment by the Legislature so long as it remains in expectancy—that is during the life of the husband. *Idem.*....289
3. Surplus Proceeds.—The Act of 1852, providing that if there should be a surplus of the land or proceeds of sale after satisfying the liens she shall have dower or compensation out of such surplus, unless such surplus or proceeds were received or disposed of during the life time of her husband; the whole of the land having been sold, the widow's right to dower must be satisfied out of the surplus proceeds of the sale for which the land, nor the purchaser thereof, is not liable. *Idem.*289

DUPLICATE TAX BILLS—

See Taxation, 12.

Dying Declarations—Elections Contests.

DYING DECLARATIONS—

See Cr. Law 35, 36.

ELECTION CONTESTS—

1. Failure to Execute Appeal Bond.—Under Acts Ex-Session 1900, pag 40, sec. 12, Kentucky Legislature, relating to election contests, and providing that "either party may appeal by giving bond to the clerk of the circuit court conditioned for the payment of costs and damages," execution of the bond is made a condition precedent to a right of appeal, and unless said bond be executed within thirty days after final judgment in the circuit court the appeal will be dismissed. *Patterson v. Davis*..... 77
2. Supersedeas Bond.—The execution of a *supersedeas* bond in this court is not a compliance with the statute. *Idem*..... 77
3. Designation of Ticket or Candidate.—Designating one in a petition of nomination as the "Republican candidate" instead of the "Candidate of the Republican party," does not affect its sufficiency. *Wilkins v. Duffy. Gill v. Mallory*111
4. Nomination by Petition—Duty of Clerk.—Though a party nomination by petition is allowable only in case of failure to nominate by convention or primary, the name of the person nominated by a petition not stating there was no other nomination, should be put on the ballot of the party by the clerk; he knowing that there was no other nomination by the party for the office, and that no one claimed it. *Idem*.....111
5. Sufficiency of Petition.—A petition of nomination for a party is not insufficient because not stating that petitioners are members of the party; the statute only requiring that it be stated that they are qualified and desire to vote for him for the office. *Idem*.111
6. Failure of Clerk to Properly Place Name of Candidate—Effect.—Failure of the clerk to place the names of candidates on the ballot under the title and device of the "Republican" party, as they were entitled to have them placed, and placing them under the title of the "Independent Republican" party, though clearly affecting the result of the election, will not vitiate it; it being claimed that the action of the clerk was in reliance on the opinion of the attorney-general in the interpretation of an opinion susceptible of the misconstruction put upon it, which would indicate that the clerk did not act from a corrupt or fraudulent motive, and he being entitled to the presumption that he acted honestly; and the law declared the election void only where it appears that there was "fraud, intimidation, bribery or violence" in the conduct of the election. *Idem*.111
7. Method of Voting—Stamping in Circle.—The election law of Oc-

Election Contests.

ELECTION CONTESTS—Continued.

- tober 16, 1900, does not repeal that part of section 1471, Kentucky Statutes, prescribing the method of voting except in so far as the act of 1900 provides for voting by stamping in a circle under the device in lieu of stamping in the square in which the device is printed; said acts being otherwise not in conflict as to the method of voting. *Herndon v. Farmer*200
8. Distinguishing Marks.—Kentucky Statutes, section 1471, providing that “no ballot shall be rejected for any technical error which does not make it impossible to determine the voter’s choice,” and there being no statute forbidding or providing for the rejection of a ballot stamped in the circle under two devices, where a ballot is marked in the circle under two devices, under one of which are candidates for several offices, and under the other only a candidate for one office, the ballot will be counted for the candidates under the first device for other offices than that of the candidate under the second device, such marking not being so placed as a distinguishing mark within the meaning of section 1476, Kentucky Statutes, but apparently made in good faith. *Idem.*200
9. Jurisdiction of Circuit Courts in Election Contests.—The act of 1898 to “further regulate elections,” and the act of October 16 and October 24, 1900, “to further regulate elections,” having heretofore been decided not to be in conflict with section 51 of the Kentucky Constitution, providing that no law enacted by the General Assembly shall relate to more than one subject, etc., the court is not disposed to re-open that question, and therefore, under these acts, the circuit court has jurisdiction to try election contests. *Idem.*200
10. Time For Answering Contest.—Under Election Law Ex-Sess., 1900, section 12, providing that within twenty days after the service of summons on him the contestee shall answer, the day on which the summons is served is included in the twenty days. *Combs v. Eversole*222
11. Flagrant Disregard of Election Law.—The returns of a precinct will be disregarded, the officers having abandoned efforts to keep the crowd the proper distance from the voting room; a large number of ballots having been marked openly for voters by one or more of the officers in the presence of the crowd who could and did witness the details; some one of the officers having accompanied other voters to the booth and there marked their ballots for them; none of the voters having been sworn as to their disability to mark their ballots; the voting going on while the officers, including the judges, were absent; some

Election Contests.

ELECTION CONTESTS—Continued.

- of the officers being drunk and a judge so that he was unable to discharge his duties; neither of the judges being able to read or write; none of the officers signing the certificate; neither of the judges participating in the count, but this being done by a challenger and an inspector not appointed or sworn as required by law; the votes of one candidate being returned as for an office for which he was not a candidate, and for, which no votes were cast for him; and there being evidence that early in the day one of the judges and the challenger of the opposite party agreed to vote the precinct for a certain combination which won. *Idem.*222
12. **Party Device and Individual Device—Voter Marking in Both.**—Acts 1900, ex-session, page 12, section 4, provides that should any elector desire to vote for each and every candidate of one party he shall make a cross mark in the circle under the device of that party, and that if the cross mark is made in the circle under the device, and the cross mark is also made after one or more candidates of a different party the ballot shall be counted for the candidate so marked and for the other candidates of the party marked. The statute also declares that no ballot shall be rejected for any technical error which does not make it impossible to determine the voter's choice. *Held*, That where an independent candidate adopted an individual device and there was no other candidate under such device, a mark in the circle under a party device and under the device of such independent candidate required the ballot to be counted for such candidate and not for the candidate for the same office under a party device. *Little v. Hall, &c.*231
13. **Preservation of Ballots.**—The statute providing for the security and custody of ballots make such ballots primary evidence in an election contest, and when such contest is filed the ballots become evidence for all proper purposes, though they were not produced and proved within the time provided by statute for the taking of proof in the case. *Edwards v. Logan*312
14. **Counting Ballots in a Contest.**—Where in an election contest the circuit judge appointed two commissioners to recount the ballots, it was error for the commissioners to refuse to permit the parties interested and their representatives to be present during their sessions. *Idem.*313
15. **Exposure of Ballots—Presumptions.**—Where the ballot boxes containing the ballots voted at an election were in the possession of the county clerk whose re-election was also in contest, and the ballot boxes though locked could have been en-

Election Contests.

ELECTION CONTESTS—Continued.

- tered by taking off the hinges which were exposed, the ballots should not be used to rebut the presumption of the correctness of the official returns, until it has been satisfactorily proved that the ballots had not been tampered with since the election, and that those offered in evidence were the identical ones cast. *Idem.*313
16. Plea Tendered Charging Alteration in Ballots.—Where, in an election contest, the ballots had been counted by commissioners appointed by the court, it was error to refuse to allow the defendant to file an amended answer charging that the ballots had been altered and changed and that unauthorized and interested persons had access to and opportunities for changing them and that therefore they were not the same ballots counted and certified by the election officers, such objection not being a ground of counter-contest required to be set up in the answer, but merely a matter affecting the evidence offered on the grounds already alleged. *Idem.*313
17. Disputed Ballots—Failure to Observe Statutory Requirements in Preservation.—Acts General Assembly 1900, page 18, section 10, requires that disputed ballots shall be placed in a linen envelope, sealed up and across the seal the officers shall write their names and shall place the county election seal in hot wax thereon, and return the same to the clerk of the county court with the election returns with a true statement as to whether they have or have not been counted, and if counted what part and for whom. *Held*, That where disputed ballots were inclosed, but no statement was made as required by the closing clause of such section except the words written on the back of each ballot: "Not counted. Questioned. W. H. Hack." such ballots were not properly preserved and could not be counted in a contest. *Idem.*313
18. Idiots.—An idiot is not a competent witness and not a legal voter, but where one was permitted to vote his vote should not have been deducted from either candidate, because there was no sufficient evidence to ascertain for whom he voted. *Idem.*...313
19. Insane Persons.—Where a person of unsound mind was permitted to vote and the day succeeding the election he was found by a jury to be of unsound mind and directed to be confined in an asylum, evidence as to his previous party affiliation was insufficient to show how he voted at such election, so as to justify the deduction of his vote from a candidate of that party. *Idem.*313
20. Residence of Voter.—Under Kentucky Statutes, section 1478,

Election Contests.

ELECTION CONTESTS—Continued.

- providing that a voter's residence is where his habitation is, and to which, when absent, he has an intention of returning, and that he shall not lose his residence by absence for temporary purposes, an unmarried man, a resident of E. county, did not lose his residence therein by going to Indiana to work with an intention of returning, where he in fact returned to E. county within a few months and was living there when the election occurred. *Idem.*314
21. Same.—Where a resident of Kentucky removed to Indiana with his family and expressed his intention to remain there permanently, he thereby lost his voting residence in Kentucky, though he afterwards changed his intention and returned to Kentucky within a year prior to the election. *Idem.*314
22. Evidence—School Census.—A school census is not admissible in an election contest to show that persons voting at the election were minors at the time of the election. *Idem.*314
23. Removing From Precinct.—Where a voter testified that he sold his property and removed his home from one election precinct to another on September 12, 1901, he was not entitled to vote in the precinct to which he removed at an election held November 5th, not having resided therein sixty days. *Idem.* ..314
24. Marking Ballot.—Where a ballot was marked with a pencil within the circle under the device under which defendant was a candidate for county attorney and cross marks were made with a stencil in the squares after several of the candidates, but not after the name of any candidate for county attorney on the opposite ticket, the pencil mark was sufficient to require the ballot to be counted for all candidates, including county attorney, under the emblem, except as to those candidates where the stencil mark was made opposite the names of candidates of other tickets. *Idem.*314
25. Same.—Where a ballot was marked under both the party devices and also opposite contestant's name, such marking indicated an intention not to vote either party ticket, but to vote for the contestant alone. *Idem.*314
26. Ballots—Stencil Marks.—Election ballots with stencil marks appearing in the circle under the device of the regular Republican ticket, and also in the circle under the device of the Independent Republican candidate for one of the officers, should not have been rejected on the count. *Bates, &c., v. Crumbaugh, &c.* (7 cases)447
27. Failure of Clerk to Sign Name on Ballot.—Where the clerk of election fails to sign his name on the back of the ballot, as re-

Election Contests.

ELECTION CONTESTS—Continued.

- quired by the statute, whether by design or through inadvertence, the ballot should not be rejected merely on account of such failure. *Idem.*447
28. Marking Ballots.—A ballot voted in the circle under the Republican device and a cross mark made in the blank under the name of one of the Democratic candidates should be counted for the Republicans except as to such one office as to which it should be counted for the Democratic candidate. *Idem.* 447
29. Blurred or Irregular Marks.—Ballots marked with a blurred figure or with irregular black marks in the circle under the device of one party should be counted for such party. *Idem.* 447
30. Ballots bearing devices for three sets of candidates marked in the circles under two of the devices should be rejected. *Idem.*447
31. Torn Ballots.—A ballot marked under the Republican device, but which was torn on the side should be counted for the Republican candidates, for having been counted by the officers the presumption must be indulged that the tearing occurred subsequent to its consideration by them, upon the theory that the officers did their duty, even if the court on appeal were of opinion that such a tear as the one in question vitiated the ballot. *Idem.*447
32. Returns.—The election returns from one precinct were signed only by the clerk of the election representing the Democratic party which was in the minority. The officers representing the other party appeared the following day and demanded the right to sign, and the balance of the Democratic officials admitted the correctness of the vote at the time it was taken. The ballots confirmed the accuracy of the count and gave no evidence of having been tampered with. *Held*, That the failure of the officials to sign the returns as required by statute, did not invalidate the vote. *Idem.*447
33. Ink Blots.—A ballot should not be rejected because of ink blots on the back thereof, there being nothing to indicate that they were put there by the voter to distinguish the ballot. *Idem.* 448
34. On the contest of an election the court will apply the same rules of evidence and draw the same deductions from the facts as would apply and be drawn in an ordinary contest over property rights. *Idem.*448
35. Ballots signed by the clerk not with his own name, "George D. Lancaster," but with the words "Hotel Lancaster," will not be rejected for that reason alone. *Idem.*448
36. Where ballots were marked unmistakably in the circle under

Election Contests—Execution Sale.

ELECTION CONTESTS—Continued.

the Republican device with the same kind of a stencil used in marking all the ballots that were counted in the precinct in question and in two other precincts, and the whole appearance of the ballots and the great weight of testimony tend to show that they were voted for the Republican ticket, the fact that there was a shadowy blur, together with marks in the circle under the Democratic device, apparently fraudulently made by a rubber cross attached to a finger or thumb, will not prevent the ballots from being counted for the Republican candidates. *Idem.*448

EMINENT DOMAIN—

See Turnpike Roads, 2.

ESTOPPEL—

See Fire Ins., 1; Notaries, 2; Railroads, 4, 15.

EVIDENCE—

See Criminal Law, 3 to 24, 28, 31, 36, 39, 45; Depositions; Divorce, 1; Election Contests, 18, 22; Fire Insurance, 3; Land, 1, 2; Malicious Prosecution, 2, 3; Peace Officer, 2; Pledge, 1, 2; Usury, 3, 4; Voluntary Conveyances, 2; Wills, 17, 18, 19, 20.

EXCEPTIONS—

See Criminal Law, 42.

EXECUTION LIEN—

See Mortgage, 1.

EXECUTION SALE—

1. Delay in Filing Pleading.—Where an answer to a motion under Kentucky Statutes, section 1689, by the execution purchaser for possession of land was not tendered until the term succeeding the motion, but an affidavit showed that respondent was over eighty-one years of age, and that his age and feebleness prevented an earlier offer to file the answer, refusal to permit the filing was error. *Wilson, &c., v. Flanders, &c.*534
2. Prior Incumbrance—Possession of Purchaser.—Kentucky Statutes, section 1689, provides that the purchaser of lands sold under execution and not redeemed within one year, shall have the right after obtaining a conveyance, to enter a motion on ten days' notice for possession of such lands. Section 1709, subsection 1, provides that if the lands so sold are incumbered the purchaser at the sale shall acquire a lien for the purchase money and interest subject to prior incumbrances. Subsection

Execution Sale—Fire Insurance.

EXECUTION SALE—Continued.

- 3 provides that the defendant in the execution may redeem the property so sold by paying the original incumbrance with legal interest, and by paying the purchaser his purchase money with interest. *Held*, That where land sold at an execution sale was incumbered, the purchaser had no right to possession under section 1689, but that the execution defendant might redeem at any time during the continuance of the original incumbrance; The execution purchaser acquiring only a lien subordinate to such incumbrance. *Idem*.534
3. Title to Land Under Sale by Commissioner, After Confirmation, Before Deed Made.—Under Civil Code, sections 394, 397, 399, 494, providing that the court may appoint a commissioner to execute its judgments, and cause title to be conveyed by the court, on a sale under judgment, and that such conveyance shall convey to the grantee the title of the parties to the action, and Kentucky Statutes, sections 1681, 1709, providing that lands to which the defendant has a legal title may be sold on execution, the interest acquired by a purchase of land at a commissioner's sale before a commissioner's deed is executed, is not subject to sale under execution. *Goodin v. Wilson*716

EXEMPTIONS—

See Homestead.

"FELONIOUSLY"—

See Criminal Law, 33.

FILING AWAY INDICTMENTS—

See Criminal Law, 37-38.

FINAL ORDER—

See Criminal Law, 38.

FIRE INSURANCE—

1. Forfeiture—Default in Paying Premium—Estoppel.—By the terms of a fire insurance policy it was stipulated that the company should not be liable for any loss occurring while any part of the premiums was due and unpaid. The policy was a renewal of a similar policy upon which the insured had been allowed to run over a few days in his payments, and, at the time of the issuance of the new policy the company's agent assured the insured that the company would see that the policy was kept alive if the premium was not paid for a few days after due. The note given for the first installment was held up a few days in pursuance of such agreement. In reliance on the prom-

Fire Insurance—Foreign Corporations.

FIRE INSURANCE—Continued.

- ise the insured did not leave his sick wife to pay a later premium when due, and two days later the house burned. *Held*, That the company was estopped from insisting on the forfeiture. *Continental Insurance Co. of New York v. Browning*. 183
2. Forfeiture—Default in Paying Premium—Waiver by Company.—Plaintiff effected insurance on his property for a term of years, the premiums to be paid annually. He paid for the first year, and gave a note for the deferred premiums, the note and policy providing that if any installment was not paid when due the company should not be liable for loss during such default, and the policy should lapse until payment should be made. The first installment, due in June, was not paid, and the company sent the note to its nearest agent to collect. During the next six months the agent sent plaintiff three notices, each demanding payment of the full amount of the installment, and in January returned the note to the company as uncollectible. On March 19th plaintiff mailed a check for the full amount of the installment which was never received. On March 23d the property was burned. *Held*, That the company by demanding payment of the full amount of the installment long after it was due, waived the conditions providing for lapse of the policy during default and thereby continued the policy in force. *Walls v. Home Insurance Co. of New York* 611
3. Check Not Paid, Not Received, and Insured Had No Funds in Bank.—The check was not received, or accepted as payment or pleaded as such, and was never paid and plaintiff did not at that time, or thereafter, have sufficient funds in the bank on which it was drawn to have paid the check. *Held*, That the mailing of the check was not payment of the installment, due but in an action to recover under the policy evidence of the mailing of the check was relevant as tending to show that plaintiff had not abandoned his contract and that he considered himself bound thereon. *Idem*. 611

FOREIGN CORPORATIONS—

1. Right to Sue in this State.—Where a foreign corporation had spent nearly \$500,000 in the construction of a telephone system in a city in this State under a franchise granted by the city, it had a right to sue in the courts of this State to protect its rights; and the fact that all of its incorporators but one were residents of the State, and that the evident object of forming the corporation elsewhere was to obtain the benefit of less rigorous laws, could not defeat that right; it appearing that the State was

Foreign Corporations—Fraudulent Conveyances.

FOREIGN CORPORATIONS—Continued.

- not complaining. Cumberland Telephone & Telegraph Co. v. Louisville Home Telephone Co. (2 cases)892
2. Telephone Poles—Interference With Erection—Injunction.—Where a telephone company had been granted a permit to erect its poles on the same side of a street with the poles of another company having a prior, but not exclusive, franchise, and the old company, whenever the new started to put in poles of a certain height, immediately changed its own poles and made them of such a height as to prevent the new company from proceeding, an injunction was issuable. *Idem.*893

FRANCHISES—

See Taxation, 22.

FRAUDULENT CONVEYANCES—.

1. Petition—Several Causes of Action.—A petition to set aside an alleged fraudulent conveyance did not contain two causes of action by alleging that the conveyance was voluntary, and also that it was made with a fraudulent intent to cheat the grantor's creditors. *Anglin v. Conley*741
2. Creditor—Claim For Unliquidated Damages.—Where plaintiff had a claim for unliquidated damages against defendant for assault and battery at the time of a conveyance by defendant, plaintiff was a creditor, and as such entitled to have the conveyance set aside as fraudulent. *Idem.*741
3. Intent of Grantor—Knowledge of Grantee.—Defendant committed an assault on plaintiff by shooting him, and immediately obtained \$500, from his brother to escape arrest, on the understanding that he would convey to his brother his interest in certain land. Defendant thereafter was arrested, whereupon the deed was executed and recorded, and thereafter the brother advanced other funds to pay for defendant's defense. There was no evidence that either defendant or his brother was aware that plaintiff had a cause of action against defendant for the injuries inflicted at the time of the conveyance, or that it was made with any other intent than to raise money with which to enable defendant to escape arrest. *Held*, That plaintiff, after recovering judgment in an action for his injuries, was not entitled to have the conveyance set aside as executed with intent to defraud the grantor's creditors. *Idem.*741
4. Change of Possession.—Where land was conveyed by defendant to his brother the fact that there was no change of possession, but that defendant, his brother, and his grandmother continued to reside on a part of the land so conveyed, did not justify a

Fraudulent Conveyances—Gift.

FRAUDULENT CONVEYANCES—Continued.

- finding that the conveyance was fraudulent as to the grantor's creditors. *Idem.*742
5. Deed Construed as Mortgage.—Where it was agreed that defendant should convey certain land to his brother in consideration of \$500 advanced to enable defendant to escape arrest for an assault, and after defendant returned and was arrested the brother advanced other moneys for defendant's defense in consideration of the conveyance, but the exact amount to be advanced was not agreed on by the parties the conveyance should be treated as a mortgage to secure such advances as against a judgment for damages sustained by such assault. *Idem.*.....742

GAMING—

1. Betting on Election—Civil Action—Penalties and Forfeitures—Right of State—Rights of Parties—Demand by the Loser of the Stakeholder.—Kentucky Statutes, section 1959, declares that if a stakeholder of a bet refuse to return the same on demand the amount may be recovered of the party aggrieved; while section 1975 imposes a fine of \$100 for betting on an election, and enacts that if the winning party has received the stakes the sum shall be forfeited to the Commonwealth. The loser of an election bet demanded the return of his money of the stakeholder, who paid the money to the winner, and proceedings by the State to recover the fine and forfeiture were united with an action by the loser to recover the deposit. *Held*, That the loser's demand for the money revoked the bet, and the receipt of the money by the winner could not be considered as of money won on a bet; therefore it was error to dismiss the loser's action and decree the forfeiture to the State. *Gardner v. Ballard, &c.*93
2. Recovery of Money Lost—Rights of Creditors.—Kentucky Statutes, section 1969, provides that whoever shall invite, persuade, or otherwise induce another to visit a place where any gambling, etc., is carried on, shall be responsible to such other and his creditors for whatever he may lose in gaming at such place. *Held*, That such statute did not include a person who entered into a partnership for the purpose of conducting a gambling house and lost money in the games played there, and hence a creditor of such person was not entitled to recover from the other partners the amount so lost. *Stapp v. Mason, &c.*900

GIFT—

1. Stipulation in Note—Effect.—A stipulation in a note executed for a valuable consideration, and due one day after date, pro-

Gift—Homestead.

GIFT—Continued.

- vided that it should become null and void on the death of the payee. There was evidence of an intent that the daughter of the payee, who was the wife of the maker, should have it as a gift. The maker paid interest thereon until the death of the payee, but the note was never delivered to the daughter. *Held*, Not to constitute a gift *inter vivos*. *Rodemer v. Rettig, &c.* 635
2. Same.—A stipulation in a note that it should become null and void on the death of the payee though intended to constitute a gift of the note, does not affect the validity of the note where it was never delivered to the donee, but it remained an asset of the estate of the payee. *Idem.*635

GOOD CHARACTER—

See Criminal Law, 29.

GROSS NEGLIGENCE—

See Railroads, 10.

GUARDS—

See Counties, 1, 2, 3, 4.

HARMLESS ERROR—

See Seduction, 2.

HOMESTEAD—

1. Exemption—Daughter Having Care of Home.—One who, having a wife and infant child and a house which he has occupied as a homestead, induces a daughter because of the infirmities of himself and wife and their inability to provide for themselves to move into the house with them and to assume its expense and care, is still a housekeeper with a family so as to be entitled to the homestead exemption. *Holburn v. Pfannmiller's Admr.*831
2. Commitment to Insane Asylum.—One's character of homesteader with the attendant rights of homestead exemption, is not lost by his commitment to an insane asylum, and the death of his wife while he is there. *Idem.*831
3. Claim for Board in Asylum.—Under Kentucky Statutes, section 257, providing that where a patient who has been supported in a State insane asylum has estate which can be subjected to debt, the commissioners of the asylum may sue for and recover the amount of his board, and subject the estate to the payment thereof, such claim is not a debt; so that on the death of the patient, his homestead can not be subjected thereto, though section 1707 allows the homestead of a decedent to be sold subject to the occupancy of his widow and infant children if a sale is necessary to pay his debts. *Idem.*831

Husband and Wife—Illegal Contract.

HUSBAND AND WIFE. (See Divorce and Alimony; Dower.)—

1. Contract—Consideration—Resumption of Marriage Relation.—Where husband and wife are living apart because of grounds of divorce which she has, and on which she has had prepared a petition for divorce, her forgiving him and resumption of her relation of wife, is sufficient consideration for his agreement to convey property for their children. *Moayon v. Moayon*855
2. Specific Performance.—It is no defense against specific performance of an agreement for sale of an undivided interest in property that it may subsequently be sold to an undesirable person. *Idem.*855
3. Mutuality of Remedy.—Where, in consideration of the mutual agreement of husband and wife, living apart because of her ground for divorce, to live with each other as husband and wife, he agrees to make a conveyance of property, and prior to the conveyance they resume their living together, it is no defense to specific performance of his agreement to convey that there is a lack of mutuality of remedy, whereby he may compel her always to live with him. *Idem.*856
4. Identification of Property—Description.—A contract to convey a third of all one's estate of whatever nature, acquired by him under his mother's will, or otherwise acquired and now owned by him, sufficiently describes the property, as it may be identified by parol evidence, to satisfy the statute of frauds. *Idem.*....856
5. Enforced in Equity.—A contract between husband and wife, by which he agrees to convey property, being just and reasonable, and such as would be good at law if made by him with a trustee for her, will be enforced in equity. *Idem.*856

IDENTIFICATION OF PROPERTY—

See Husband and Wife, 4.

IDIOTS—

See Election Contests, 18.

ILLEGAL CONTRACT—

1. Bribery of Officials—Corruption Fund—Recovery of Fund by a Contributor.—Plaintiff, defendant, and another, who were engaged in maintaining an illegal lottery in Ohio, met, and on defendant's representation that it was necessary to contribute money with which to bribe the State and city officials in order to procure immunity from prosecution, plaintiff paid to defendant monthly for several years various sums to be used for such purpose. Defendant converted the money to his own use. *Held*, That defendant was not plaintiff's agent, but that plaintiff and

 Illegal Contract—Land.

ILLEGAL CONTRACT—Continued

defendant were partners in an illegal enterprise, and plaintiff could not recover the amount so paid. *Smith v. Richmond and others*303

IMPLIED REPEALS—

See Taxation, 24.

INDEMNIFYING BONDS—

See Sheriffs, 4.

INDICTMENTS—

See Criminal Law, 33, 37, 38.

INFANTS—

See Descent and Distribution, 1; Partition of Land.

INJUNCTIONS—

See Foreign Corporations, 2.

INSANE PERSONS—

See Election Contest, 19; Homestead, 2, 3; Life Insurance, 6, 7, 8, 9; Criminal Law, 39, 41.

INSTRUCTIONS—

See Criminal Law, 26, 29, 39, 43, 44, 45; Railroads, 7.

INTERSTATE BRIDGE—

See Taxation, 5, 6.

JOINDER OF PARTIES—

See Parties to Actions.

JUDICIAL KNOWLEDGE—

See Street Improvements, 1; Taxations, 10.

JUDICIAL SALES—

See Mortgages, 1.

JUDGMENTS—

See Appeals, 1.

LAND—(See Assignment for Creditors, 1, 2; Execution Sales, 2, 3.)

1. Title Bond—Evidence—Proof of Execution.—A title bond for land patented and carried into grant, which had been assigned by the patentee to S., and by S. to T., and by T. to appellee more than twenty years ago, and under which appellant had entered looking for title to appellee, who held under it, was properly received in evidence without proof of its execution. *Helton v. Belcher*172

Land—Landlord and Tenant.

LAND—Continued.

2. Commissioner's Deed—Evidence without Proof of Judgment.—Under Kentucky Statutes, section 519, providing that "certified copies of all instruments legally recorded, shall be *prima facie* evidence in all courts in this State," a certified copy of a commissioner's deed which shows that said deed was examined and approved by the court and so endorsed, is admissible in evidence without proof of the judgment authorizing it. *Idem.* 172

LANDLORD AND TENANT—

1. Repairs—Construction of lease—Natural Wear and Tear.—A lease of a building provided that the lessee should keep the property in the same repair as on the completion of certain improvements, "natural wear and tear excepted," and to surrender them in as good condition as received, "natural wear and tear, and natural decay and injury or destruction" by any cause not their fault, excepted. *Held*, That while the lease imposed no obligation on the lessee to repair injuries caused by natural wear and decay, it did not require the landlord to repair the roof, destroyed by natural wear and decay. *Thomas and Others v. Conrad*841
2. Statutory Provision—Action for Rent.—Kentucky Statutes, section 2297, provides that unless the contrary be expressed in a lease, an agreement of a tenant to leave the premises in repair, shall not bind the tenant to rebuild a building destroyed by casualty, nor shall the tenant be liable for the rent for the remainder of his term for a building destroyed by casualty without his fault. *Held*, That no obligation was imposed on a landlord to restore a roof destroyed by wear and tear, and therefore a tenant could not set off against the rent the cost of replacing the roof which was destroyed by natural decay. *Idem.*841
3. Implied Obligation—New Roof.—There is no obligation implied at common law arising out of a contract for rent, that the landlord will pay the expense of a new roof to replace one destroyed by natural wear and decay. *Idem.*841
4. Reformation of Contract—Mistake of Draftsman.—Where, by mistake of the draftsman, a lease failed to contain the agreement of the parties that the lessor was to make repairs, and the lessees on the refusal of the lessor to replace the roof, which had been destroyed by natural wear and decay, did so themselves, they were entitled in an action for the rent, to ask for a reformation of the contract to express such agreement. *Idem.*842
5. Rights of Assignee of Lease.—Where a landlord asserts a claim

 Lordlord and Tenant—Life Insurance.

LANDLORD AND TENANT—Continued.

under a lease against the assignees of the lessees, any claim which would have been available as a defense by the lessees, is available by the assignees. *Idem.*842

LIENS—

See Execution Sale, 2; Mortgages; Partnerships.

LIFE INSURANCE—

1. Application to Accompany Policy—Co-operative Companies.—Kentucky Statutes, section 619, requiring that the application or charter and by-laws of an insurance company doing business under the laws of this State, or a copy thereof, shall be attached to the policy before it can be treated as part of the contract and used in evidence, applies to assessment co-operative companies doing business on the lodge plan. Supreme Commandery of the United Order of the Golden Cross of the World v. Hughes.175
2. Answer—Demurrer—Fraudulent Representations.—Where an answer in an action on a mutual benefit certificate did not allege reliance on any representations, except those made in the application, which were alleged to be fraudulent, and that part of the answer alleging such representations was properly stricken out because the application was not made a part of the policy, as required by Kentucky Statutes, section 679, a demurrer to the answer was properly sustained. *Idem.*.....176
3. Incontestable Policy—Fraud—Rescission.—Where an insurance policy was procured by fraud, the fact that by its terms it was incontestable, did not preclude the insurance company from rescinding it within a reasonable time after discovering the fraud on surrendering the premium received. New York Life Insurance Company v. Weaver's Admr.... 295
2. Laches—Deceit.—Where an incontestable insurance policy was procured by fraud and the company did not elect to rescind the same during the life of the insured, and on her death under an impression that it could not defend an action on the policy paid the same, it was not entitled to maintain an action against assured's administrator for deceit, to recover the amount of the policy paid and other damages. *Idem.*.....295
3. Agent Soliciting Without License.—Kentucky Statutes, section 633, makes it unlawful for any one to solicit applications for insurance on behalf of any foreign insurance company in this State, without a license therefor from the insurance commissioner of this State, and sections 641 and 644, Kentucky Statutes, defines what are insurance companies in the meaning of the

Life Insurance.

LIFE INSURANCE—Continued.

- law. *Held*, That one who solicits insurance for any foreign insurance company in this State, though it be an assessment or co-operative company, without a license from the insurance commissioner, is liable to the penalty therefor prescribed in said section 633. *Sims v. Commonwealth*827
4. Forming Domestic Corporation.—Under Kentucky Statutes, section 880, providing that "when articles of incorporation are filed and recorded, as provided in section 779, and a certificate of that fact is issued by the secretary of State, the signers shall be deemed a body corporate," the filing of the articles of incorporation in the county by the company represented by the defendant, does not constitute it a domestic corporation, as no copy thereof was ever filed in the office of the secretary of State as required by section 880. *Idem.*827
5. Mutual Benefit Certificates—Suicide—By-laws Part of Contract.—Kentucky Statutes, section 679, requires the application charter and by-laws of an insurance company doing business in the State, or a copy thereof, shall be attached to the policy or certificate before they can be treated as part of the contract. A certificate issued by a mutual benefit association contained no stipulation as to suicide, but declared that it was subject to the by-laws of the order which were not a part of the certificate. The only provision in the by-laws on the subject of suicide, was in the provisions prescribing the form of application for membership in the association. But the application signed by the insured was on a different form and contained no stipulation as to suicide. *Held*, That the by-laws relating to suicide could not be considered as a part of the certificate, so as to enable the insurer to make a defense based thereon. *Mooney v. Ancient Order of United Workmen Grand Lodge of Kentucky*950
6. Insanity.—An insured in a mutual benefit certificate containing no stipulation as to suicide, committed suicide. He was about twenty-two years of age. His father had died four months before. He had no reason to complain of life. At the death of his father he acted singularly, and continued to so act from time to time. Some of his friends before he killed himself, thought him insane. His conduct on the night before his death and at the time of the suicide tended to sustain this conclusion. *Held*, That the question whether he was sane or insane at the time of the suicide was for the jury. *Idem.*951
7. When Certificate Void.—A mutual benefit certificate, payable

Life Insurance—Master and Servant.

LIFE INSURANCE—Continued.

- to a designated beneficiary and which is silent on the subject of suicide, becomes void if the insured commits suicide when sane. *Idem.*951
8. The certificate does not become void if the insured commits suicide when insane. *Idem.*951
9. Insanity Defined.—Insured was insane at the time of committing suicide, if he was then without sufficient reason to know what he was doing, or to distinguish right from wrong, or if he had not sufficient will power to govern his actions by reason of some insane impulse which he could not control. *Idem.*951

LIMITATION—

See Administrator's, 1, Railroads, 1, 4, 5; Sheriffs, 2; Street Improvements, 4, 6; Surface Water, 1.

LIVE STOCK—

See Railroads, 12, 13

LOTTERY—

See Illegal Contracts.

MALICE—

See Malicious Prosecutions.

MALICIOUS PROSECUTION—

1. Probable Cause—Question for Court.—What facts are sufficient to constitute probable cause in an action for malicious prosecution, is a question of law for the court. Metropolitan Life Insurance Company, &c. v. Miller.....754
2. Sufficient Cause—Instructions.—Where, in an action for malicious prosecution, it was clearly proved that plaintiff had collected money for defendant, insurance company, and had not charged himself with it or accounted therefor, and had failed to make good the amount after the default had been discovered, it was error to fail to charge the jury that if the jury believed such facts, then there was probable cause for plaintiff's arrest, and they should find for defendant. *Idem.*.....754
3. Malice—Must be Proved.—In an action for malicious prosecution, plaintiff must prove malice in fact, which is an evil or unlawful purpose in causing plaintiff's arrest, as distinguished from a motive to promote justice. *Idem.*.....754

MANDAMUS—

See Primary Elections.

MASTER AND SERVANT—

1. Defects in Machinery—Promise of Master to Repair—Duty of Servant.—A servant is not exonerated from the duty of exer-

Master and Servant—Mortgages.

MASTER AND SERVANT—Continued.

- cising ordinary care for his own safety from the use of defective machinery, of which he had knowledge, because of a promise of the master to repair such defects. *Reiser v. Southern Planing Mill & Lumber Company*.....1
2. Waiver by Servant of Liability of Master—Assumption of Risk.—While the law imposes on the master the duty to provide suitable machinery for the use of the servant, if the servant has knowledge that the machinery is defective and he continues to use it, without complaint, he assumes the risk therefrom, and waives the right to hold the master liable in case of injury. *Idem*.1
3. Complaint of Servant—Failure of Master to Repair—Negligence of Servant.—If, however, the servant does complain and the master promises to repair the machinery in a reasonable time, then the master can not rely upon the knowledge of the servant of the defective condition of the machinery so as to relieve himself from responsibility, but this principle does not go to the extent of holding the master liable for an injury which results from the negligence of the servant and not from the defects of the machinery. *Idem*.....1

MEASURE OF DAMAGES—

See Railroads, 2, 7; Surface Water, 2; Telephones, 1; Turnpike Roads, 2.

MILITARY TELEGRAMS—

See Criminal Law, 10.

MINISTER TO FOREIGN COUNTRY—

See Attorneys, 5.

MISCONDUCT OF COUNSEL—

See Criminal Law, 42.

MISJOINDER OF ACTIONS—

See Fraud Con., 1.

MISPRISION—

See Taxation, 9.

MISTAKE—

See Landlord and Tenant, 4; Settlement of Accounts, 1, 2.

MORTGAGES. (See Fraudulent Conveyances, 5.)

1. Execution Lien—Judicial Sale—Redemption.—Land subject to mortgage, was sold under execution and purchased by the execution creditors. Subsequently the mortgage was foreclosed

Mortgages.

MORTGAGES—Continued.

and a decree was entered for a sale to pay in order, the mortgage, the execution lien, and other claims held by H. and others. The proceeds of the sale were sufficient only to pay the mortgage and execution lien, and the mortgagor's equity of redemption was then sold to plaintiff under section 1686, Kentucky Statutes, providing that though the equity of redemption may be sold, the debtor still has the right to redeem until the end of the year from the first sale. The debtor being unable to redeem, S. agreed to pay the sum to plaintiff, who exercised his right of redemption, and S. also agreed to pay the debtor's wife a certain sum on her joining in a deed of the land to S., releasing her potential right of dower. Before consummation of this agreement, H. and others had caused executions to issue against the debtor, and on the the day that the deed was executed to S. plaintiff brought an attachment suit against the debtor on another debt and caused garnishee process to be served on S. Afterwards the outstanding executions of H. were levied on the land. *Held*, That the transaction between the debtor and S. was not a redemption by the debtor whereby title revested in him and became subject to the executions of H., but that the debtor's right to redeem was personal and not an interest in the land, and the deed to S. was an assignment of this right, and redemption inured to the benefit of S. *Potter, &c. v. Skiles, &c.*.....132

2. *Fraud*.—The transaction between the debtor and S. was not fraudulent. *Id.*132
3. *Right of Debtor's Wife*.—The only right remaining in the wife of the debtor, was to compensation for the value of her right of dower in that part of the land not necessary to the payment of the mortgage debt. *Idem.*132
4. *Extended Opinion—Dower of Debtor's Wife*.—By extended opinion, it is held that after the sale of the debtor's land under the original execution, and the sale of his equity of redemption therein, and he had conveyed his equity of redemption in both sales to Skiles, who was the purchaser thereof at both sales, he, Skiles, desiring to obtain a full title thereto, procured from Mrs. Smith, the debtor's wife, a release of her inchoate right of dower in the proceeds of the sale of the entire tract, after paying the mortgage debt for which it was sold, in which transaction the creditors of the husband have no interest and can not require that the sum paid or contracted to be paid the wife for such release shall be subjected to the payment of their debts, though the sum paid the wife may have been more than the actual value of her dower. *Idem.*.....133

Municipal Corporations.

MUNICIPAL CORPORATIONS—

1. Negligence—Obstruction of Street—Street Railroads—Injury to Pedestrian—Proximate Cause.—Plaintiff alleged that the city permitted one of its streets to become obstructed on its north side by debris, etc., leaving only a narrow path between the obstruction and the tracks of a street railway, and permitted undergrowth, bushes, etc., to remain in the street, which obstructed the vision of pedestrians on that side, and that by reason thereof plaintiff's intestate, while walking along such path, was struck by a car and killed. Plaintiff further alleged that the collision occurred in the daytime and that the motor-man in charge of the car, by the exercise of ordinary care could have discovered intestate's peril in time to avoid striking her. *Held*, That the negligence of the city in permitting the street to be obstructed was not the proximate cause of the accident. *Setter's Admr. v. City of Maysville*.....60
2. Mayor—Absence from City—Powers of President of Board of Aldermen—Authority to Fill Vacancy in Police Department—"Absence" Defined.—Kentucky Statutes, section 3204, providing that in the absence of the mayor from a city, the president of the board of aldermen shall act as mayor, does not authorize the president of the board to appoint a member of the board of police and fire commissioners, created by section 3137, where the mayor was absent for about a day at another city about twenty-five miles distant; the cities being connected by railroad, telegraph and telephone service, and where there was no emergency requiring the president of the board to act. The word "absence" as used in this statute is not merely a physical absence of the mayor from the city, but such an absence as renders him incapable, for the time being, of performing the act that may be in question, which act must present such a necessity for immediate attention as to require it to be *then executed*. *Watkins v. Mooney*646
3. Confirmation by Board of Aldermen.—Kentucky Statutes, section 3137, creates a board of police and fire commissioners for cities of the second class of four members, with the mayor *ex officio* chairman, and directs that the four commissioners shall be appointed by the mayor, subject to the approval of the board of aldermen, and the mayor is authorized to fill all vacancies in the board. Section 3108 expressly confers on the mayor the power to fill all vacancies unless otherwise provided. *Held*, That a mayor's appointment of a member of the board of police and fire commissioners to fill a vacancy, need not be confirmed by the board of aldermen. *Idem*.....647
4. Power to Acquire Park for City Purpose.—Kentucky Statutes,

Municipal Corporations—Notaries.

MUNICIPAL CORPORATIONS—Continued.

section 3038, gives cities of the second class power to acquire property for municipal purposes, and section 3058, subsection 16, confers power to purchase or lease any real or personal property for the use of the city. *Held*, that the acquisition of land for a public park was for a municipal purpose, and authorized. *City of Lexington v. Kentucky Chautauqua Assembly*.781

NATIONAL BANKS—

1. Power to Purchase Corporate Bonds.—Under the National Banking Act, (Rev St. U. S., section 5156), giving national banks all such incidental power as shall be necessary to carry on the business of banking by "discounting and negotiating" promissory notes, drafts, bills of exchange, and other evidences of debt, a national bank has power to purchase bonds issued by the board of education of a city. *Newport National Bank v. Board of Education of Newport*.87

NATURAL GAS—

1. Negligence—Explosion—Liability.—A company supplying natural gas to consumers is not an insurer of the safety of its product so as to be responsible for a failure to keep it confined, where such failure is caused by the negligence of the person to whom the gas was furnished, but is only liable for a failure to exercise ordinary care. *Triple-State Natural Gas & Oil Company v. Wellman*.79
2. Same.—Defendant company furnished natural gas to a mill, the pipes being so arranged that the gas passed through a "regulator" which reduced the pressure before the gas reached the meter. There was, however, a "by-pass" by which the gas could be turned into the meter at the full pressure of the main. Both the cock to turn the gas through the "regulator" and that to turn it through the "by-pass" were under the control of the mill owners. While plaintiff was leaving the mill after having been there to seek work, the owner of the mill, in turning on the gas, accidentally turned the cock admitting the full pressure, and the meter exploded, injuring plaintiff. *Held*, That the only negligence was that of the mill owner, so that defendant was not liable for plaintiff's injuries.79

NOTARIES—

1. Fees—Contract for Services—Inclusion of Fees—Legality.—A bank clerk, by the contract of hiring, was to receive fifty dollars per month for his services including notarial fees, and

Notaries—Partition of Land.

NOTARIES—Continued.

- after receiving such compensation he sued for his notarial fees (which did not amount to fifty dollars per month) on the ground that a contract by a public officer to accept less than his legal fees is illegal. *Held*, That the contract having been understood, and the lump sum accepted being greater than the fees, there was no contravention of public policy. *Second National Bank of Ashland v. Ferguson*.....516
2. Estoppel.—Plaintiff having received and retained the fifty dollars per month in satisfaction of his services, and having remained in the employment, he was estopped from demanding further compensation. *Idem*.516

NUISANCE—

See Contract, 1.

OBSTRUCTION OF ACTION—

See Railroads, 5.

OFFICE AND OFFICER—

See Notaries, 1, 2; Salaries, 1, 2, 3; Peace Officer.

OMISSION OF WORDS—

See Bills and Notes, 6.

OVERRULED CASES—

- Murrell's Admr. v. McAllister*, 79 Ky., 311, overruled by *Cradock, &c. v. Payton, &c.*, 303; *Nevin v. Gaertner*, 20 R., 1022, 48 S. W., 153, and *Richardson v. Dunn's Assignee*, 22 R., 344, 57 S. W., 230, are overruled so far as they conflict with *Gaertner v. Louisville Artificial Stone Co.*.....160
- Order v. Commonwealth*, 80 Ky., 32, 4 R., 18, overruled by *Reynolds v. Commonwealth*, so far as it conflicts therewith..913

PARTITION OF LAND—

1. Infants—Not Parties to Original Action—Subsequent Approval.—Though under Civil Code, section 499, infants are necessary parties in partition of real estate held jointly by them and others, yet, though they were not made parties, an adult, to whom part of the land was allotted, having instituted suit for special performance of her contract of sale to a third person, and they being made parties by cross petition of the defendant, and their guardian having filed an answer alleging that the partition was advantageous to them, the chancellor may, in such suit, on proof that the partition was equal and just, approve of the partition. *Blue and Others v. Waters*.....659

Parties to Action—Peace Officer.

PARTIES TO ACTION

See Railroads, 19.

1. Joinder—Service of Process—Jurisdiction.—Where an action alleged a breach of contract against a party residing and summoned in the county in which the action was brought, and therewith joined another party residing and summoned in another county, alleging a separate cause of action against him, such cause of action being improperly joined, the court acquired no jurisdiction of the defendant so improperly joined by reason of service of process in another county under section 78 and section 85, Civil Code of Practice. *Johnson v. Brafford, &c.*96
2. Same.—Where the quarterly court acquired no original jurisdiction of a party by service of process on him in a county other than that in which the suit was brought in an action in which he was improperly joined with a party residing in the county in which the suit was brought, the fact that he was thereafter properly served with process on appeal to the circuit court, brings him before such court only to the extent that he was before the quarterly court. *Idem.*97

PARTNERSHIPS—

See Gaming, 2; Illegal Contract.

1. Mortgage—Firm Debts—Priority.—Each of two partners gave a mortgage on an undivided one-half of the partnership property to secure a personal debt, but before they were recorded, the partners gave a mortgage on the firm property to secure a prior debt. One of the partners testified that the other partner understood when the first mortgages were given that they only gave a lien on their interest in the property after the partnership debts were paid, each partner reserving his equitable lien for the payment of partnership debts. The other partner contradicted such testimony, but the mortgagee in the firm mortgage testified that the latter partner stated that there was no prior mortgage lien. The lower court held that all the firm's debts were superior liens and should be paid before the individual debts of the partners, and this judgment is affirmed. *Harris v. Tuttle*882

PEACE OFFICER—

1. Arresting Without Warrant—Right to Kill—Liability—Attempt of Supposed Felon to Escape.—Criminal Code, sections 36 and 46, authorizing a peace officer to make an arrest without a warrant, where he has reasonable grounds for believing that the person arrested has committed a felony, such officer, without a

 Peace Officer—Physicians.

PEACE OFFICER—Continued.

- warrant, is not justified in shooting a man while fleeing to escape arrest for an offense less than a felony. *Petrie v. Cartwright*.103
2. Action by Wife of One Killed by Peace Officer—Evidence—*Res Gestae*.—Where plaintiff and her sister were insulted by two men, and plaintiff having informed her husband of the insult, he followed and accosted the men and struck one of them, and a scuffle ensued, whereupon the city marshal came up and plaintiff's husband being advised to run, did so, and on refusing to stop at the command of the officer, was shot and killed by such officer; in an action by the wife against the officer to recover damages for the alleged wrongful killing of her husband, evidence as to what took place between the men and plaintiff and her sister was admissible as part of the *res gestae*. *Idem*.103

PEREMPTORY INSTRUCTIONS—

See Railroad, 6.

PEST HOUSE—

1. Unlawfully Maintained—Infection Therefrom—Liability of City—Proximate Cause.—Where a pest house is maintained by a city, within a mile of the city limits, from which a member of a family nearby contracts smallpox, one who becomes a guest of the family for a day and contracts the disease without knowledge of the infection at the pest house or in the family, and which, at the time, was not known by the family to be smallpox, may recover damages therefor from the city; the location of the pesthouse being held to be the proximate cause of the injury. *City of Henderson v. O'Haloran*.187
2. Contributory Negligence.—The fact that the visitor discovered that a child with whom she slept during her visit, had an eruption which she was told by the mother was chicken-pox, will not render the visitor guilty of contributory negligence so as to defeat her right to a recovery. *Idem*.188

PHYSICIANS—

1. Skill Required—Liability.—The care and skill required of a physician in treating a patient, is not to be measured by that exercised by "ordinarily skillful and prudent physicians, in that (particular) vicinity, in treating a like injury," but by such as is exercised generally by physicians of ordinary skill in similar communities. *Burk v. Foster*.20
2. Same.—The mere fact that the result of a patient's treatment "is as good as is usually obtained in like cases similarly situated,"

Physicians—Primary Elections.

PHYSICIANS—Continued.

will not preclude a recovery by the patient against the physician for negligence and lack of skill; the patient being entitled to the chance for the better results which might come from proper treatment. *Idem*.....20

PLEADING. (See Election Contest, 16; Execution Sale, 1; Life Insurance, 2; Sheriffs, 3; Streets, 1; Taxation 7.)

1. Compromise—Fraud—Tender of Payment.—Where plaintiff sued for personal injuries, admitting that he had received payment for his drug bill and loss of time, and defendant pleaded payment in full under a compromise agreement set forth, a reply that this payment was the same as that admitted in the petition and that the compromise agreement was signed by plaintiff at a time when he could not read, and under false representations, that it was a receipt for payment only for drug bill and loss of time, was not demurrable for failing to tender repayment of the amount received, though plaintiff in such action can not ordinarily escape such agreement by merely pleading fraud. *McGill v. Louisville & Nashville Railroad Company*.358

PLEDGE—

1. Parol Evidence—Admissibility to Vary Writing.—Where a transaction is evidenced by an unambiguous written instrument showing it to have been a pledge of notes as collateral security, parol evidence that the notes were in fact sold absolutely, is inadmissible, no fraud or mistake having been alleged. *Johnson v. Zweigart*.545
2. Construction of Writing—Contemporaneous Release of Attorney's Fees—Usury.—An attorney, to whom his client was indebted, secured \$2,500 from the client, and executed a written receipt in full for his fees. He also turned over to the client certain notes; the client signed an instrument which declared that the attorney "has sold and delivered to me, for the sum of \$2,500 cash, the following notes . . . I am, however, after I have collected (net) on said notes the sum of \$2,500 and interest . . . to return to said J. (the attorney) the unpaid notes, or cash, if same be then collected." *Held*, That the transaction was a pledge of the notes as collateral security for a loan of \$2,500, and not an absolute sale, and that the contemporaneous release of attorney's fees was void as constituting usury. *Idem*.545

PRIMARY ELECTIONS—

1. Recounting Ballots—Notice of Contest.—Kentucky Statutes, sec-

 Primary Elections—Prohibition, Writs of.

PRIMARY ELECTIONS—Continued.

- tion 1563, provides that in all cases of contest the governing authority of a political party holding a primary election shall have power to hear and determine the same in such manner as the committee shall determine. *Held*, That a written notice from a candidate to the committee that he proposed making a contest, where no contest had in fact been made, was not sufficient to require the committee to recount the ballots. *Henry and Others v. Secrist*.....677
2. *Mandamus*—Petition.—Where a petition for a mandatory injunction to compel a committee of a political party to recount the ballots at a primary election, averred that plaintiff, who was a defeated candidate, after notice to the committee, had demanded such recount, that he believed it would show that he had received a plurality of the votes, and that the committee refused his written request therefor, or to make any arrangement for deciding the contest which he proposed to make, but failed to allege any fraud, wrongdoing or mistake on the part of the committee, or any of the officers of the election—it was demurrable. *Idem*.677

PROBABLE CAUSE—

See Malicious Prosecution.

PRESUMPTIONS—

See Counties, 3; Criminal Law, 29.

PROHIBITION, WRITS OF—

1. Power of Court of Appeals to Issue—Scope of Writ.—Under Constitution, section 110, providing that the court of appeals shall have power to issue such writs as may be necessary to give it a general control of inferior jurisdictions, such court has authority to grant a writ of prohibition against a circuit judge proceeding without jurisdiction. *Campbellsville Tel. Co. v. Patteson, Judge*53
2. Issuance by Circuit Judge against Private Corporation.—Kentucky Statutes, section 3639, provides that the validity or constitutionality of any city ordinance of fifth class cities shall be tried by a writ of prohibition from the judge of the circuit court of the district in which such city is located, with right of appeal by either party to the court of appeals; and Civil Code, section 479, declares that the writ of prohibition is an order of the circuit court to an inferior court of limited jurisdiction prohibiting it from proceeding in a matter out of its jurisdiction. *Held*, That a writ of prohibition could only issue to test the validity of an alleged invalid ordinance in a case where a

Prohibition, Writs of—Railroads.

PROHIBITION, WRITS OF—Continued.

judge was attempting to enforce the same, and could not be granted against a private corporation to prohibit it from acting under the ordinance. *Idem.*53

PROTEST—

See Bills and Notes, 3, 4.

RAILROADS—

1. Tracks in the Street—Damages to Abutting Property—Limitation.—While the right to sue a railroad company for damages caused to abutting property by reason of the construction and operation of a railroad track in a street pursuant to legislative and municipal authority, is barred by the five years' statutes of limitation, in a like action for damages for the construction and operation of such track in a street without such authority, the fifteen year statute of limitation applies. *Klosserman, &c v. Chesapeake & Ohio Ry. Co., &c.*.....426
2. Measure of Damages.—Where a railroad company is authorized by legislative and municipal authority to construct and operate a single railway track in a street, and concurrently constructs two tracks in such street, an additional servitude is thereby imposed upon property abutting on the street and damages can be recovered by the owner of such property for the construction and operation of the double track by an action instituted within fifteen years from the construction of said tracks, and in such case, the measure of recovery is whatever damages the abutting property owners have sustained by reason of the construction and operation of two tracks in said street, which they would not have sustained by the construction and prudent operation of one track therein. *Idem.*.....426
3. Resident of Kentucky Negligently Killed in Tennessee—Liability Under Tennessee Statute.—Plaintiff's Intestate was killed in Tennessee where contributory negligence will not defeat the action, but goes in mitigation of damages only. In an action for damages brought in Kentucky, the liability for damages is governed by the laws of the State of Tennessee. *Louisville & N. R. R. Co. v. Whitlow's Admr.*.....470
4. Limitation—Estoppel to Plead.—Where limitation is pleaded by a tortfeasor in its answer, it is proper to plead in reply, matter showing defendant to be estopped to set up that defense. *Chesapeake & Nashville Ry. v. Speakman*.....628
5. Obstruction of Action by Defendant.—Kentucky Statutes, section 2532, provides, *inter alia*, that when a personal injury action accrues against a resident of the State and a prosecu-

Railroads.

RAILROADS—Continued.

- tion thereof is obstructed by the defendant by indirect means, the time of obstruction shall not be included in the period of statutory limitations. A railroad company represented to an employe who had been injured, that if he would not bring suit, they would give him a permanent job, pay him for his time while sick, and pay for his injuries when their extent was determined, and thereby induced him not to sue until limitation had run, after which he was discharged and told that he would receive nothing further. *Held*, That the company was estopped from pleading the statute. *Idem*.....528
6. Injury to Servant—Defective Coupling—Contributory Negligence Peremptory Instruction.—Plaintiff, a brakeman, was directed to couple certain cars equipped with a Buckeye automatic coupler, which, when in good condition, is operated by the brakemen standing outside the track, by a lever running across the end of the car. The coupler in question was broken, to the knowledge of the railroad company's servants, but its condition was not ascertained by plaintiff until he attempted to use it, when it was necessary to raise the pin by hand. The train was about twenty-five feet away, backing down the grade, and after discovering the condition of the coupler, plaintiff placed one foot inside the rail and raised the iron pin, in which position his arm was caught and crushed. Behind the car which was coupled with other cars which were being loaded with live stock, on which persons were working, and if the coupling had not been made, such persons and stock might have been injured; and plaintiff testified that it was partly to prevent this that he attempted to make the coupling. *Held*, That plaintiff was not guilty of contributory negligence as matter of law sufficient to preclude his recovery. *Murphy v. Baltimore & Ohio Southwestern Railroad Company*.696
7. Licensee—Injury—Measure of Damages—Compensation for Injuries.—In a personal injury case, it is error to instruct that the jury should consider the time plaintiff has lost or may lose, the pain he has endured or may endure, and the disability to labor and enjoy life which he has suffered or may suffer from the injuries, and the expense incurred, or which may be incurred in the treatment of the injuries; the proper element of damage being the reasonable expense of cure, including any expense reasonably certain to be afterwards necessarily incurred, the fair value of the time lost and a fair compensation for the physical and mental suffering endured or which it is reasonably cer-

Railroads.

RAILROADS—Continued.

- tain will be endured and any permanent reduction of earning power. *Louisville & Nashville Railroad Company v. Logsdon*.746
8. Negligence.—Having defined "negligence" as meaning the failure to use ordinary care, it is proper to state in another instruction that if the jury believed defendant "negligently" pushed one of its cars against the one in which plaintiff, a licensee, was, etc., they should find for plaintiff. *Idem*.747
9. Ordinary care is such care as a man of ordinary prudence might reasonably be expected to exercise under like circumstances. *Idem*.747
10. Gross Negligence—Submission to Jury.—At the request of his father plaintiff was loading a lumber car on a side track, which his father had secured from defendant company. Defendant's freight train pulled in on the main line about opposite the lumber car which was in plain view of the trainmen, and the engine went up to the switch with a flat car loaded with rock and set it down on the side track. A brakeman on the rock car undertook to stop it before it reached the lumber car, but failed to do so and in the ensuing collision plaintiff was injured. *Held*, That the question of gross negligence was properly submitted to the jury. *Idem*.747
11. Carriers—Unlawful Discrimination—Indictment—Railroad Commission—Failure to Exonerate in Special Case—Effect on Future Shipments.—Constitution, section 218, makes it unlawful for common carrier to charge more in the aggregate for the transportation of passengers or property of like kind, "under substantially similar circumstances and conditions," for a shorter than a longer distance over the same line in the same direction, etc., provided that on application to the Railroad Commission the carrier may, on investigation, be authorized to do otherwise, and the commission may from time to time prescribe the extent to which the section may be relieved against. *Kentucky Statutes*, section 820, provides the punishment for such unlawful discrimination, and the procedure therefor, and enacts that on complaint to the commission it shall investigate the grounds thereof and make an order either exonerating or failing to exonerate the carrier, and shall furnish a copy of the latter, with a statement of facts, to any grand jury having jurisdiction, in order that the carrier may be indicted for the offense and shall use proper efforts to secure indictment and prosecution. *Held*, That an order failing to exonerate a carrier and recommending its indictment in specially named cases, could not be made the

 Railroads.

RAILROADS—Continued.

- basis of an indictment for unlawful discrimination in subsequent shipments. *L. & N. R. R. Co. v. Commonwealth*788
12. Live Stock Shipment—Facilities For Feeding and Watering—Evidence.—In an action by a shipper of horses against the carrier for damages to the animals from the length of time they were on the cars without feed and water, and from failure to furnish proper facilities for feeding and watering them, statements of defendant's agents at the shipping point made as an inducement to ship over their line as to what facilities defendant would furnish for watering and feeding the stock while en route, and what time would be required for the journey, are competent evidence, they not tending to vary the contract or alter the terms of the bill of lading. *Illinois Central Ry Co. v. Eblin et als.* .815
13. Owner Accompanying—Liability of Carrier.—Though the shipper of stock agrees to accompany and feed and water it, the carrier is liable for damages thereto from failure to furnish proper facilities for feeding and watering. *Idem.*817
14. Right of Way—Donation—Consideration.—Where plaintiff, with a number of other land owners, agreed to donate land as a railroad right of way, and it appeared that it was three miles and a half from his residence to the nearest depot, and that the building of the new railroad would provide a depot within a mile and a half, the necessary increase in the value of plaintiff's land was a sufficient consideration for his agreement. *Cadiz Railroad Co. v. Roach*934
15. Estoppel.—Where a land owner agreed to donate land to a railroad company for a right of way, and thereafter the railroad commenced work upon its road and graded the road bed to a point near the grantor's land, who, then, for the first time, repudiated his grant, he was estopped from denying the obligation of his agreement on the ground that it was without consideration. *Idem.*934
16. Consideration.—The partial building of a railroad in reliance on a promise to donate a right of way, was a sufficient detriment to the promisee to constitute a good consideration for the promise. *Idem.*934
17. Baggage—What Constitutes—Liability of Carrier.—Under Kentucky Statutes, section 783, providing that every company shall check every parcel of "baggage" taken for transportation, a company is only liable as a carrier for what the passenger takes with him for his own personal use and convenience, unless the company by contract express or implied has accepted other articles as baggage. *Illinois Central Ry. Co. v. Matthews*973

Railroads—Salaries.

RAILROADS—Continued.

18. Merchandise—Notice to the Carrier—Paying For Overweight.—
The paying of overweight charges on baggage is not, of itself, such notice to the company that the trunk contains merchandise or other articles than the passenger's ordinary baggage, as will render the company liable as a carrier for such articles. *Idem.*973
19. Action For Damages—Owner of Goods.—Where a traveler is not the owner of the goods which he checks as baggage, but is liable to such owner for any loss or damage to them, he may be treated as their owner for the purposes of an action against the carrier for damage to such goods in its hands. *Idem.*973

RAILROAD COMMISSION—

See Railroads, 11.

RESCISSION—

See Life Insurance, 3.

REHEARING—

See Criminal Law, 27.

REPAIRS—

See Landlord and Tenant, 1.

RES GESTAE—

See Peace Officer, 2.

RES JUDICATA—

See Taxation, 13.

RIGHT OF WAY—

See Railroads, 14.

SALARIES—

1. Increase During Term.—Kentucky Statutes, section 934, provides that county treasurers shall receive for their services as compensation a salary not to exceed \$1,000 per annum to be fixed by the fiscal court; and Constitution, section 161, declares that the compensation of any county officer shall not be changed after his election or appointment or during his term of office. *Held*, That where a county treasurer's salary was fixed at \$1,000 per annum at the time of his election, the fact that at that time it was not understood that he would be required to perform services that he was subsequently required to perform, but which he was in fact liable to perform at the time of his election, did not authorize the fiscal court to grant such treasurer an ad-

Salaries—Schools and School Districts.

SALARIES—Continued.

- ditional allowance of \$1,000 for such services. *Jefferson County v. Waters*48
2. **Clerk Hire.**—Such increase was not sustainable on the ground that it was voted for clerk hire made necessary by the increased duties. *Idem.*48
3. **City Treasurer—Change During Term—Constitutional Law.**—Constitution, section 161, declares that the compensation of any city officer shall not be changed after his election or during his term of office. Kentucky Statutes, section 3212, provides for the maintenance of a board of education in a city which, by section 3214, has control of the school funds. Section 3225 makes the treasurer of the city treasurer of such board. Section 3064 declares that the general council of the city shall fix the salary of each officer, and that no such salary shall be changed after his election or during his term of office. During the term of the city treasurer the board of education allowed him a certain salary as treasurer of such board. *Held*, That the allowance was unlawful, and the fact that additional services had been imposed on the officer during his term did not authorize an increase of his salary during said term. *Board of Education City of Lexington, &c., v. Moore*640

SCHOOLS AND SCHOOL DISTRICTS—

1. **Teachers—Examinations—Grade—Mandamus to Issue Certificate.**—While mandamus will not lie to compel the board of examiners of teachers to give a teacher any particular grade, yet where they have examined her papers and fixed her standing they have no further discretion, and may be compelled by mandamus to issue her a certificate of the grade to which she is entitled. *Northington v. Sublette, &c.*72
2. **Discretion of Superintendent.**—Kentucky Statutes, section 4503, declares that a county teacher's certificate of the first class shall require an average grade of 85 per cent. Section 448 declares that words purporting to give authority to three or more persons shall be construed as giving such authority to a majority of them. *Held*, That where two of the three members of the board of examiners decided that a teacher had passed an examination entitling her to a county certificate of the first class, the county superintendent had no discretion to refuse to issue a certificate of that grade to her. *Idem.*73
3. **Trustees—Act of Board—Void Without Notice to All.**—Under Kentucky Statutes, section 4445, providing that "the trustees in their corporate capacity at a meeting, called for that purpose,

 Schools and School Districts—Settlement of Accounts.

SCHOOLS AND SCHOOL DISTRICTS—Continued.

- shall employ a teacher and agree with him as to compensation," a contract employing a teacher executed by two of the trustees at a meeting in the county jail where one of them was confined, of which meeting the third trustee had no notice, is void. *Scott, &c., v. Pendley*606
4. Employment of Teacher—Contract by Two Without Notice to Third Trustee Void.—It is necessary that a contract to be binding on the district should be executed at a board meeting at which all three of the trustees are present, and no meeting can be held unless all are present, or unless the absent member has had notice, provided the absent member is in the county and with reasonable effort and diligence the notice could have been served on him. *Idem.*606
5. The fact that the absent trustee had expressed himself in opposition to employing the person contracted with did not render a notice to him of the meeting unnecessary. *Idem.*606

SEDUCTION—

- 1 Evidence—Offer to Marry.—In a prosecution for seduction under promise of marriage where there was evidence that defendant offered to marry prosecutrix after the alleged seduction and that she saw her father and defendant in consultation with reference to the proposed marriage it was error to refuse to allow prosecutrix to testify on cross-examination as to a conversation between herself and defendant immediately after the latter's interview with the father, in which defendant stated that he had told the father of the seduction; notwithstanding which he had refused his consent to the marriage. *Ingram v. Commonwealth*726
2. Harmless Error.—Exclusion of this testimony was, however, non-prejudicial in view of the testimony of both defendant and the father that the time of conversation defendant did not tell the father that he had had sexual intercourse with prosecutrix. *Idem.*726
3. Defense—Bona Fide Offer to Marry.—Under Kentucky Statutes, section 1214, declaring that no prosecution for seduction shall be instituted when the person charged shall have married the girl seduced, and any prosecution shall be discontinued if accused marry the girl before final judgment, a bona fide offer to marry the prosecutrix before the institution of the prosecution, though refused by her, is a complete defense. *Idem.*....726

SETTLEMENT OF ACCOUNTS—

1. Where one seeks to surcharge a settlement of accounts for mistake

Settlement of Accounts—Sheriffs.

SETTLEMENT OF ACCOUNTS—Continued.

- of facts not known to him when the settlement was made, it is incumbent on him to sustain the charge clearly by a preponderance of evidence. *Bailey, &c., v. Wood, &c.*27
2. Alleged Mistake in Giving Mortgage.—In an action to foreclose a mortgage wherein defendant contended that the mortgage note was by mistake given for a greater sum than due, evidence considered, and held not to sustain such defense. *Idem.*.....23

SHERIFFS—

1. Action on Official Bond—Liability of Sureties for Wrongful Levy of Attachment.—The official bond of a sheriff covers his wrongful act in levying an attachment upon the property of a stranger to the suit, and entitles the owner to recover damages against the sureties on said bond; the act of making the wrongful seizure being a breach of the covenant "to well and faithfully perform the duties of his office," and gave a right of action that instant against the sheriff and his sureties. *Hill v. Ragland, &c.*209
2. Limitation.—The action against the sheriff not being for a tort but for the breach of his official bond, is not barred under the four-year statute, section 2515, nor the seven-year statute, section 2551, and the liability against him and his sureties continues for fifteen years from the breach under section 2514, Kentucky Statutes. *Idem.*209
3. Pleading—Defective Plea Cured by Verdict.—A judgment "*non obstante veredicto*" should not be rendered by the court in a case where the parties understood and attempted to join an issue to be tried, however defective in form the pleadings may be, and a verdict for the one or the other in such case will be held to cure such defective pleadings, unless the facts when considered as properly pleaded do not entitle the party obtaining the verdict to the relief given. *Idem.*209
4. Bond of Indemnity.—The taking of a bond of indemnity by the sheriff before executing an order of attachment, will not protect him from a suit by a stranger to the writ whose property has been erroneously levied on. *Idem.*209
5. Sale of Goods by Receiver.—The fact that the goods so wrongfully taken were delivered by the sheriff to the receiver of the court and sold by him under order of the court, will not protect the sheriff, the sale being made merely to preserve the property under section 218, Civil Code, the original fault being the sheriff's the consequences must fall on him. *Idem.*210
6. Discretion of Court—Filing Amended Plea.—The action of the court in rejecting an amended answer tendered after one trial,

 Sheriffs—Statutes.

SHERIFFS—Continued.

denying that appellant was the owner of the goods levied on which had stood confessed up to that time, was not an abuse of discretion in the court. *Idem.*210

7. Excessive Tax Collected—Liability of Sureties on Official Bond.—

Where a county levied and the sheriff collected a tax for county purposes in excess of the constitutional limit, the sureties on his general official bond, conditioned as required by Kentucky Statutes, section 4556, that he shall "well and truly discharge all the duties of said office and pay over to such persons at such times as they may be respectively entitled thereto, all money that may come into his hands as sheriff," are not liable for such excess of tax collected. *Commonwealth, for use of Nicholas County v. Stone, &c.*511

SPECIAL LEGISLATION—

See Taxation, 15.

SPECIFIC PERFORMANCE—

See Contracts, 2; Husband and Wife, 2, 3.

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STENOGRAPHERS—

Transcript of Notes—Taxation of Fee as Costs.—Under Kentucky Statutes, section 4639, requiring the official stenographer, upon direction of the judge, either upon his own motion or upon motion of either party, to take stenographic notes of the testimony in an action, "and upon the motion of either party," to cause a full transcript of the same to be made, the fee of the stenographer for such transcript can not be taxed as a part of the costs against the unsuccessful party unless the transcript was made by order of the court. *Albin v. Louisville Railway Co.*982

STREETS. (See Municipal Corporations, 1.)—

1. *Employee of City—Pleading.*—The fact that the appellee was the servant of the city driving a patrol wagon, did not impose on him the duty to negative contributory negligence by averring in his petition that he did not know the condition of the street where he was injured, as it was no part of his duty to examine the streets and report upon their condition. *City of Louisville v. Michels*551
2. *Low Limbs of Trees—Contributory Negligence—Liability of City.*—A city is liable, under its duty to keep its streets in good condition, for injury to one, who, without contributory negligence is driving a wagon along a street, and is thrown therefrom by coming in contact with a large limb of a tree projecting over the street, dangerously low. *Idem.*551

STREET IMPROVEMENTS—

1. *Apportionment Warrants—Ordinances—Pleading—Judicial Notice.*—Under Kentucky Statutes, section 2775, requiring the courts to take judicial notice of city ordinances, and section 119, Civil Code, providing that facts of which judicial notice is taken need not be pleaded, and that in pleading a private statute it is sufficient to refer to it by its title and date; it is sufficient in a suit to enforce the lien of an apportionment warrant for street improvements to refer to the ordinance, under which the apportionment was made by its title and date. *Gaertner v. Louisville Artificial Stone Co.*160
2. *Attested Copy of Contract and Apportionment—Prima Facie Case.*—Kentucky Statutes, section 2838, providing that "in actions to enforce liens for street improvements a copy of the

Street Improvements.

STREET IMPROVEMENTS—Continued.

contract therefor and the apportionment duly attested shall be prima facie evidence of all facts necessary to be established by plaintiff," and the plaintiff's alleging that the street, improved, had been used as a street for more than forty years, and the grade had been fixed but the record thereof could not be found, and the answer denying that the grade had been fixed as pleaded, but not denying that the street had been used or that the sidewalk had been constructed and remained on that grade for forty years, there was no sufficient denial of the allegations of the petition, and the plaintiff having made out a prima facie case, he was entitled to recover on his apportionment warrant. *Idem.*160

3. Overruled Cases.—The case of *Nevin v. Gaertner*, 20 R., 1022; 48 S. W., 153, and *Richardson v. Dunn's Assignee*, 22 R., 324; 57 S. W., 230, are disapproved so far as they are in conflict herewith. *Idem.*160
4. Written Contract—Limitation.—Kentucky Statutes, section 2615, relating to limitations of actions after five years, by its provisions applies to actions created by statute, but not to actions upon a writing. *Held*, Not to apply to a contract between a city and a contractor for a street improvement, wherein the city in writing agreed to pay for so much of the cost as was collectible against the abutting owners, such action not being an action created by statute, but one on a contract in writing is governed by the fifteen-year statute of limitations. *City of Louisville v. McNaughton*333
5. Intersection—Paving—Assessment of Costs.—Kentucky Statutes, section 2833, provides that if the territory to be charged with the cost of constructing a street improvement is bounded on on all sides by principal streets, the cost must be apportioned among the lot owners in each one-fourth of the square contiguous to the improvement, and, if the territory contiguous to any public way is not defined into squares by principal streets, the ordinance providing for the improvement must state the depth on both sides "fronting" the improvement, which is to be assessed according to the number of square feet owned by the parties within the depth set out in the ordinance. *Held*, That such statute did not provide any mode of assessment for the improvement of a street intersection which was not surrounded by property bounded by streets, nor had any property fronting thereon, and hence the cost thereof must be paid by the city. *Button v. Kremer*463
6. Limitation—Change of Street Grade—Action For Damages From Surface Water.—The cause of action for damages to an abutting

 Street Improvements—Taxation.

STREET IMPROVEMENTS—Continued.

owner from a permanent unimprovement by the raising of the street grade, whereby the surface water from the pavement is thrown on his lot, accrues at the time of the change, so that the statute runs from that time. *Hay v. City of Lexington*.....665

SUICIDE—

See Life Insurance, 5, 6, 7, 8.

SUMMONS—

See Election Contest, 10.

SURETIES—

See Administrators, 1; Bills and Notes, 2; County Judge, 1; Sheriffs, 1, 2, 7.

SURFACE WATER—

1. Drainage Over Lower Land—Limitation—Waiver.—Plaintiff and defendant owned adjoining farms, defendant's being higher and draining over plaintiff's into a creek. Before plaintiff purchased, defendant had permitted a third party to cut a ditch through his land which turned on to plaintiff's farm water which would not naturally flow there. Afterwards he agreed with plaintiff to construct and keep open a continuation of the ditch from plaintiff's line to the creek, &c. This agreement was performed for several years. *Held*, That if defendant had acquired the right to maintain the ditch as originally constructed by the third party by limitation, he waived it by his subsequent conduct. *Raleigh v. Clark*732
2. Contract to Maintain Ditch—Breach—Measure of Damages.—Defendant, whose farm adjoins plaintiff's and drained over it into a creek, agreed to construct and keep open a ditch from plaintiff's line to the creek, and afterwards let the ditch fill up whereby plaintiff's land was overflowed and his crops damaged. *Held*, That if plaintiff by himself cleaning out the ditch could have avoided the damage, he was only entitled to recover from defendant the reasonable cost of opening the ditch and keeping it open. *Idem*.732

TAXATION—

1. Finality of Action of Assessing Officers.—Where the proper assessing officers, in the time and substantially in the manner prescribed, have acted in fixing the valuation on property liable to assessment for taxation, and no relief has been sought in the time allowed for correction of their action, it is final. *Coulter, Auditor, v. Louisville Bridge Co.*42
2. Counties—Towns—Poll Tax—Right to Levy.—Constitution, sec-

Taxation.

TAXATION—Continued.

- tion 180, which provides that "the General Assembly may authorize the counties, cities or towns to levy a poll tax not exceeding \$1.50 per head," does not, by reason of the disjunctive "or," preclude the levy of the tax by both a county and a town; the purpose of the section being to limit the levy, in either county, city or town, to \$1.50 per head. *Short, Sheriff, v. Bartlett, &c.*143
3. Right of Fiscal Court to Levy Both Inside and Outside of Cities and Towns.—Under the Constitution and enactments of the Legislature a county, through its fiscal court, can levy an *ad valorem* tax, within the constitutional limitations, on all property in the county for county purposes, outside or inside cities and towns, and, in the same way, may levy a poll tax for county purposes upon citizens both inside and outside of cities and towns located therein. *Idem.*143
4. Cemetery Company.—Funds of a cemetery company derived from the sale of lots therein are not exempt from taxation under Constitution, section 170, and Kentucky Statutes, section 4026, exempting from taxation "places of burial not held for private or corporate profit," and "institutions of purely public charity." *Commonwealth v. Lexington Cemetery Co.*165
5. Interstate Bridge—Franchise Tax—Valuation.—Where, in an action involving the validity of a franchise tax on an interstate bridge company, there was no showing that there was any difference in value between the part of the bridge within the limits of one State and that within the limits of the other, it will be presumed that the value of the property in each State is in proportion to the length of the bridge therein. *Commonwealth of Kentucky v. Covington & Cincinnati Bridge Co.* ...343
6. Same.—Where fifty-nine per cent. of the length of an interstate bridge was within the limits of Kentucky, the valuation of the bridge company's franchise for taxation should be found by taking fifty-nine per cent. of the total value of the stock and bonded indebtedness, and deducting from this amount the assessed valuation of the tangible property of the bridge company in Kentucky. *Idem.*343
7. Property Omitted From Taxation—Mandamus—Jurisdiction of County Court.—Kentucky Statutes, section 4241, requires the sheriff or auditor's agent to cause to be listed for taxation all property omitted by other officers, and to file in the office of the clerk of the county court a list of property; provides that at the next regular term of the county court, if it shall appear to the court that the property is liable to taxation, and has

Taxation.

TAXATION—Continued.

- not been assessed, it shall enter an order fixing its value, and if not liable it shall make an order to that effect; and that from so much of the order deciding whether the property is liable to assessment, either party may appeal. *Held*, That where the court declines to consider the question of liability of the property to taxation there can be no appeal, so that mandamus will lie to compel the court to consider the matter. *Commonwealth ex rel., &c., v. Newell, Judge*419
8. Suit For Taxes—Pleading—Submission of Action.—Where the issues have not been completed, though they should have been, the party in default as to time is not entitled to a continuance, it not being shown that any advantage was taken of the defendants, and it appearing that every allegation against them was controverted, and in such case it was not error in submitting the case without waiting for the issues to be formally completed where it appears that the actions had been pending for a long time and the parties had had full time to prepare their case and no one was prejudiced thereby. *Woolley, &c., v. City of Louisville*556
9. Clerical Misprision.—To render a judgment before the action stood for trial is, under Civil Code, section 517, a clerical misprision, but no motion having been made in the lower court to set the judgment aside under Civil Code, sections 516, 518, the objection is not available in the Court of Appeals. *Idem.* 557
10. Tax Bills—Authentication—Judicial Knowledge of City Ordinances.—Kentucky Statutes, section 2996, providing that "each tax bill shall be authenticated by the assessor by his signature or a stamped *fac simile* thereof, and when so authenticated it shall be *prima facie* proof that all steps have been taken to make it a binding tax bill for the amount and purposes and against the persons and property therein named, and this rule shall apply to the tax bills of 1885 and 1886 that have been so authenticated under the ordinance of the general council," is a valid statute, and the fact that the ordinance for the years 1885 and 1886 are not filed and there is no proof that the provisions of the ordinances were complied with, is immaterial because the court must take judicial knowledge of the ordinances of the city as provided in Kentucky Statutes, section 2775. *Idem.*557
11. Prima Facie Case—Burden of Proof.—When the genuineness of a tax bill is denied, the city, to make out its *prima facie* case, must show that the tax bills were made out and signed by the assessor as required by Kentucky Statutes, section 2996, *supra*,

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- and when this is shown the prima facie case is made out as fully as if there had been no denial, and the burden then shifts to the defendant to show that the proper steps were not taken.
Idem.557
12. Duplicate Tax Bills—Not Marked "Filed."—In this case some of the original tax bills having been lost, by a consent order, duplicate tax bills were substituted therefor, and such duplicates having been used in taking depositions, and treated by the court as part of the record, the fact that they were not marked "filed" by the clerk is not chargeable to appellee, and this court will treat them as part of the record. Where the original tax bill is lost we see no reason why the same effect should not be given to a duplicate of it made out and certified by the officer and proved by him to be a correct duplicate.
Idem.557
13. Res Judicata.—An order of injunction made in a previous action between the parties hereto, which recites that "it is agreed and so ordered that the defendant, the city of Louisville, is hereby perpetually enjoined from asserting any claim for taxes in or to the property described in the petition prior to March 31, 1884," applies only to the taxes levied prior to March 31, 1884, although it was entered on June 19, 1889. *Idem.*557
14. Constitutional Law—Interest on Taxes.—Kentucky Statutes, section 2998, which is the act of May 12, 1884, is not unconstitutional in allowing interest on unpaid taxes; the giving of interest thereon is no more than a penalty for their nonpayment, the validity of which has long been recognized by this court.
Idem.558
15. Wrongful Assessment—Special Legislation.—Kentucky Statutes, section 2986, providing that "no mistake in or omission of, the right name of the owner or holder of the land or improvements liable to be assessed under the provisions of this act, shall impair any assessment thereof, if such land be designated in the books (required to be kept by the assessor by Kentucky Statutes, section 2985), by its corresponding number and block on the map, or if such improvement be there designated by the number and block of the land on which it rests, or if such lands and improvements be otherwise fully identified in said books," is not special or local legislation because it applies only to cities of the first class and the city of Louisville being the only city of the first class in the State, and there is no reason why the Legislature may not provide that irregularities in the assessment shall not avail the taxpayer to escape the payment of

Taxation.

TAXATION—Continued.

- his public dues when there is enough in the assessment to show the property taxed. *Idem.*558
16. Commissioners of Sinking Fund.—Under act of March 9, 1867, and Kentucky Statutes, sections 3010, 3011, and 3024, creating and prescribing the duties of the board of commissioners of the sinking fund of the city of Louisville, and section 2979, providing that "all taxes already levied or imposed under existing laws and not yet paid, remain payable, unless the contrary be hereafter provided." the taxes levied for the benefit of the sinking fund are in substance levied for the payment of the debts of the city, and the fact that they were made payable to the said commissioners, does not affect in any manner, appellant's liability. *Idem.*558
17. Board of Equalization.—The fact that the board of equalization was not properly elected as required by Kentucky Statutes, section 2994, is unavailing to the appellants, as they do not show that they made any complaint of any assessment. *Idem.*558
18. Life Tenant.—Where land was conveyed to Mrs. W. for life, with remainder to her heirs, in a suit against her for taxes on such land, her children were not necessary parties, inasmuch as it could not be known who were her heirs until she died, and no cause of action accrued against them until her death. *Idem.*558
19. Manner of Sale.—Kentucky Statutes, section 2998, provides that "all tax bills, uncollected in whole or in part . . . shall be deemed a debt from such person (owing same) to the city arising as by contract, and may be enforced as such by all remedies given for the recovery of debt in any court competent for that purpose." Section 3005 provides that "the action herein authorized and the judgment and subsequent proceedings therein . . . shall be conducted in all respects like suits upon liens arising from contract, and the court shall have jurisdiction of all suits for taxes irrespective of the amount," and section 3006 provides that "from the beginning of the action, a lien for each tax bill assessed against the same owner or set of owners shall also arise upon every piece of land or improvement still owned by him or them, with a view to a sale of less than all the pieces for all the tax bills, subject to the marshalling of burdens as against third parties;" under these provisions the chancellor, having a broad discretion in enforcing tax liens, did not err in directing a sale of so many of the lots as might be necessary to make the judgment, which was really less op-

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TAXATION—Continued.

- pressive on the defendants than to order parts of the lots to be sold. *Idem.*558
20. Remaindermen.—Kentucky Statutes, section 3007, relating to the collection of taxes due by infants or persons of unsound mind, providing that land owned by them shall not be sold . . . “so as to defeat the reversions, remainders or future estates, while any future estates are outstanding, unless the reversioners or remaindermen are ascertained and are of full age,” has no application to sales where the remaindermen are ascertained and are of full age. *Idem.*559
21. Same.—In an action by a city for taxes in which there were interests in remainder, the court in its decree properly “reserved power over the distribution of the fund arising from the sale ordered, to the parties respectively entitled thereto,” inasmuch as the city had a lien on the remainder as well as on the particular estate, and if it shall turn out when the sale is made, that any injustice is done the remaindermen, the court can adjust this matter between them and the life tenant. *Idem.*559
22. Franchises—City Assessments—Public Service Corporations.—Act of March 19, 1898, conferring on the city assessor of cities of the first and second classes, authority to assess the franchises and intangible property of certain public service corporations, was not repealed by the general revenue act of 1902, which purports to be an amendment to the revenue law of 1892, as amended by twelve acts specifically enumerated in the title, not including the act of 1898, and providing that the assessment of the franchises, etc., of such corporations shall be made by a board of valuation and assessment; and hence it was the duty of the assessor of the city of Louisville, a city of the first class, and not the board of valuation and assessment to assess the franchises of such corporations within such city. *Murphy v. City of Louisville.*762
23. Cities of Different Classes.—Act of 1898 entitled “An act concerning the assessment and valuation for taxation of corporate franchises and intangible property, by cities of the first and second class,” was not objectionable as containing more than one subject, by reason of the fact that it applied to cities of different classes. *Idem.*762
24. Implied Repeal—Enactment—Title.—Act 1898 providing for the taxation by cities of the first and second classes, of franchises of public service corporations, was not invalid on the ground that it attempted to revise or amend the general law in regard

Taxation—Turnpike Roads.

TAXATION—Continued.

to revenue, and did not contain a recital of the laws amended at length. *Idem.*762

TEACHERS—

See Schools, &c.

TELEPHONES—

See Foreign Corporations, 2.

1. **Wrongful Disconnection—Measure of Damages.**—By mistake a physician's telephone was disconnected for non-payment of rent, when in fact, the rent had been paid. During the eighteen hours it had been disconnected, persons endeavoring to reach the physician by telephone were informed that it had been disconnected for non-payment of rent. *Held*, in an action by the physician against the company for damages, it appearing that although considerably annoyed, he had suffered no pecuniary injury, he is not entitled to recover punitive damages—the measure of damages being the amount paid for the service for the time the 'phone was disconnected, taking for the basis the amount paid by the month. *Cumberland Telephone, & Telegraph Company v. Hendon*501

TORT FEASORS—

See Railroads, 4.

TRANSCRIPTS—

See Stenographers.

TRUST ESTATES—

See Assn. for Creditors, 3.

TURNPIKE ROADS—

1. **Judgment of Chancellor.**—Where the evidence is conflicting, the judgment of the chancellor will not be disturbed unless he has proceeded on an improper basis in determining the value of the property in controversy. *Richmond & Lancaster Turnpike Co. v. Madison Fiscal Court.*351
2. **Eminent Domain—Condemnation—Just Compensation—Method of Ascertaining Value.**—In a proceeding under Kentucky Statutes, section 4748b, to condemn a turnpike road, evidence of the fact that the \$20,000 worth of stock of the turnpike company was selling at par, taken in connection with section 242, Kentucky Constitution, providing that just compensation must be made by corporations or individuals taking private property for public use, and the act of March 17, 1896, providing for the appointment of county commissioners to determine the value

Turnpike Road.—Unliquidated Damages.

TURNPIKE ROADS—Continued.

of turnpike roads condemned by the county courts, the measure of just compensation to be paid a turnpike company is its actual value at the time of the condemnation, and not what it would cost to construct a turnpike at that time. *Idem*.....352

ULTRA VIRES—

See Counties, 4.

USURY—

1. Payment to Secure Time for Defense.—Where plaintiff's suing on notes, are entitled at a certain term of court to judgment by default, or that the issues be made up by answer, payment of a stipulated sum which was six per cent. interest on the principal, to secure time for preparing the defense, is not a payment of usury. *Alexander v. First National Bank of Harrodsburg. Same v. Mercer National Bank of Harrodsburg*683
2. Though a note bears interest at a usurious rate, yet a payment made being less than legal interest for the time covered on the debt, does not contain usury. *Idem*.683
3. Penalty—Evidence.—In a suit against a bank by E. for a penalty for receiving usury from him, it is not competent for the bank's president to testify that a deceased person told him that half the payments were furnished by her. *Idem*.....683
4. Effect if Competent.—Testimony of a bank's president in an action against it by E. for a penalty for receiving usury from him, that a deceased person told him she furnished half the payments, even if competent, is insufficient to overcome the testimony of E. that he actually paid the interest at the rate of eight per cent., and the admission of the president that he received such sum and that it was paid as interest. *Idem*..683
5. Renewal Notes—Insolvency of Estate—Agreed Settlement Thereof.—Where a year after the death of T. who had given a note to a bank with E. and A. sureties on it, it appeared that his estate was insolvent and capable of paying only seventy per cent. of his debts, if real estate of his be sold at a certain price, and it was agreed by all that E. should buy the real estate and the bank should loan him enough to pay seventy per cent. of T.'s indebtedness and the additional thirty per cent. of his indebtedness to it, and this was done, and E. and A. gave this note to it for a loan; such note was not a renewal of the first note so as to allow usury in the first note to be taken advantage of in an action on the second note. *Idem*..683

UNLIQUIDATED DAMAGES—

See Fraud Con., 2.

Verdict—Warehousemen.

VERDICT—

See Sheriffs, 3.

VOLUNTARY CONVEYANCE—

1. Creditors—Action to Set Aside—Defenses.—Under Kentucky Statutes, section 1907, providing that “every conveyance made by a debtor of any of his estate without valuable consideration therefor, shall be void as to all his then existing liabilities,” in an action to subject property conveyed by a debtor, in consideration of love and affection, to the payment of a liability existing at the time of the conveyance, the fact that at that time he had other property subject to execution, more than sufficient to pay his debts constituted no defense. *Townsend, &c. v. Wilson, &c.*.....504
2. Evidence—Transaction with Decedent.—Under Civil Code, section 606, providing that “no person shall testify for himself concerning any verbal statements of or any transactions with, or any act done by one who is dead when the testimony is offered,” in an action to subject land to the payment of debts of the grantor where the conveyance stating the consideration as love and affection, conveyed the property to two children, and if they died without issue and before reaching majority, then to the mother, she was incompetent to testify to any transaction with deceased to show that the conveyance was not voluntary. *Idem.*505

VOTER—

See Election Contest, 18 to 22.

WAREHOUSEMEN—

1. Moving Warehouse—Liability on Bond.—Tennessee Code, section 3381, 1880a, 2597, requires a tobacco warehouseman to give a bond to keep his warehouse in good condition. *Held*, That when a warehouseman gives a bond and then moves his business to another warehouse, it is not necessary to give a new bond. *Bailey, &c. v. Wood, &c.*.....28
2. Inspectors of Tobacco—Deputies.—Under Tennessee Code, sections 3388, 3389, relative to inspectors of tobacco and making warehousemen inspectors of tobacco with authority to appoint deputies, it is not necessary that the deputies should be warehousemen. *Id.*28
3. Several warehousemen may appoint the same deputy. *Idem.*...28
4. Compensation of Warehousemen.—Tennessee Code, sections 3399, (1898a), 2615, provide the compensation of warehousemen for receiving, storing, inspecting, coopering and selling tobacco, shall be as follows, to-wit: To be paid by seller, \$2.50 and

Warehousemen—Wills.

WAREHOUSEMEN—Continued.

one per cent. commission on proceeds of sale; to be paid by buyer, \$1.50, and for storage after sale, after the first thirty days for each month or part thereof, twenty-five cents; and sections 3400, (1899a) 2616, imposes a penalty for charging any more than is allowed in the proceeding sections. *Held*, That the fees specified in section 3399, cover only the items enumerated, and on a resale of tobacco after a rejection of bids by the owner, under authority of section 3400, the warehouseman, on such resale may charge a fee of \$2.00 for his expenses for re-sampling and reselling, according to a custom prevailing for twenty years. *Idem*.28

WAIVER—

See Bills and Notes, 7; Fire Insurance, 2; Master and Servant, 2.

WILLS—

1. Construction—Devise to Children then Living—Death of Devisee Leaving Children.—Kentucky Statutes, section 2064, provides that "when a devise is made to several as a class, or as joint tenants, if a devisee die before the testator, leaving issue, the share of such devisee shall go to his descendants, unless a different disposition is made by the deviser, and that a devise to children embraces grandchildren, when there are no children and no other construction will give effect to the devise." Section 4841 enacts that "If a devisee dies before the testator, or is dead at the making of the will, leaving issue who survive the testator, such issue shall take the estate of the deceased devisee unless a different disposition is made by the will." *Held*, That where a testator left an estate to his wife for life then to be equally divided "between my children then living," but one of his children died before testator's death, leaving issue, such issue were entitled to the share of such child. *Ruff v. Baumbach*.336
2. Same.—The right to dispose of property by will is a statutory one, and the language of the will must be considered in connection with the statutes; the use of the words "then living," by the testator does not manifest an intention to exclude the descendants of those who may be dead, and they are entitled to stand in the shoes of their ancestor in the division of the estate. *Idem*.336
3. Validity.—The validity of a will is to be determined under the statute in force at the time of the testator's death. *Coleman, &c. v. O'Leary's Exr., &c.*.....388

Wills.

WILLS—Continued.

4. Bequest for Masses.—A bequest in trust for masses for the repose of testator's soul, was valid, being enforceable on application by the heirs, and was not void as a private trust contravening the doctrine of perpetuities. *Idem*.....388
 Bequest for School Children.—A bequest of a certain sum "to be invested and the income of which to be applied in rewards of merit to pupils in the parochial poor schools in La." was certain and valid. *Idem*.....388
5. A bequest to one, "to be applied to any charitable use so as to do most good in his judgment," is invalid. *Idem*.388
6. A bequest to the Jesuit order "for the purpose of education or religion" was invalid, as not to "an identified or ascertainable object." *Idem*.388
7. A bequest in trust to a certain person and "three others to be chosen by him, was not objectionable for the power given to the trustee named to select his colleagues. *Idem*.....388
8. Laws in Force in this State.—Under Constitution, 1799, art. 6, section 8, adopting the general laws of Virginia which included English statutes made in aid of the common law prior to 4 Jac., 1, "which are of a general nature not local to that kingdom," the adoption thereby, of statute 43, Eliz. Ch., 4, relating to charitable trusts, included more than the preamble thereof, and conferred on the courts a corrective and remedial power in the administration of such trusts; such power having been directly exercised by the English courts after the enactment of the statute without the intervention of the commissioners provided by it. *Idem*.388
9. Bequest for Poor People.—Acts 1852 (1 Rev. St., p. 235) permitting bequests in trust "for the relief or benefit of aged or impotent and poor people," which succeeded 43 Eliz. Ch., 4, adopted by the State, in which the words were, "for relief of aged impotent and poor people," did not change the meaning and does not require that the "poor" who may be beneficiaries of such trust must be old or impotent, but those who need assistance; and a bequest for founding a home for "poor men" was not uncertain. *Idem*.....389
10. Same.—A bequest in trust for the establishment of a home for "poor men" was not uncertain because no one was given power to select the objects of the charity, as the trustees would have authority to act in the management under the direction of the chancellor. *Idem*.389
11. Same.—A residuary bequest in trust to the "Bishop of the Catholic Diocese of Louisville . . . for the establishment

Wills.

WILLS—Continued.

- of a home for Catholic men," was not void for being indefinite as to the location in which the home should be established, and from which the beneficiaries should be selected, as under 1 Rev. St., p. 236, section 2, providing that equity may uphold a charitable trust by taking hold of the fund, and directing its management, and settling who is the beneficiary thereof, the will would be construed as requiring the establishment of the home in Louisville and the selection of the beneficiaries from that diocese. *Idem.*389
12. Permitting the Execution of Void Clauses.—To the extent that testator's heirs knowingly permitted the executors and trustees under void clauses of his will attempting to create charitable trusts, to proceed with the execution of the will as if valid, and to expend the fund for the benefit of the supposed objects of charity, no recovery can be had by them; nor if investments have been made in execution of the supposed purposes of the void clauses, can recovery be had for the loss, if any, occasioned by such re-investment. *Idem.*.....389
13. Change of Law after Probate.—The validity of a bequest is to be determined by the statute in force at the death of the testator and when the will was probated. *Crawford's Heirs v. Thomas, &c.*484
14. Charitable Bequest—Certainty of Objects.—Under General Statutes, c. 13, section 1, providing that with certain restrictions, all devises and gifts for the benefit of any of certain objects, including churches, "or for any other charitable or humane purpose," shall be valid, a bequest of a fund to a trustee, to be expended "in securing an evangelist," and "in the advancement of the principles of primitive Christianity as taught by the Christian Church," is valid as a charitable bequest to aid in the advancement of the principles of Christianity as taught by the Christian Church otherwise known as the "Reform Church" or "Church of the Disciples of Christ," as the purposes of the charity and the beneficiaries thereof are pointed out with reasonable certainty. *Idem.*.....484
15. Costs.—Plaintiffs having failed in an action brought by them, as heirs of testatrix, to invalidate the bequest, it was error to charge the trust fund with the costs of the action. *Idem.*..484
16. Undue Influence—Declarations of Testator.—Statements or declarations of a testator whether made before or after the execution of the will, are not competent as direct evidence of undue influence, but are only admissible to show the mental condition of the testator at the time of making the will, and his

Wills—Writing.

WILLS—Continued.

- susceptibility to the influences by which he was surrounded at the time. *Wall, &c., v. Dimmitt, &c.*923
17. Statements of Husband of Testatrix.—In a will contest by heirs who alleged that the will was procured by the undue influence of the testatrix's husband, evidence that the husband had stated that he would see that contestants received no part of the wife's estate was admissible. *Idem.*921
18. Evidence Erroneously Excluded—Effect.—Where a finding that a will was procured by undue influence was found on appeal to be unsupported by the evidence, but it was also decided that certain evidence which might have formed a basis for the finding was erroneously excluded, the case can not be remanded with an order to probate the will, but must be remanded for a new trial. *Idem.*923
19. Husband Beneficiary—Statements of—Competency.—Where a husband was a beneficiary under his wife's will, the fact that as tenant by curtesy, he would have taken the same interest he took as devisee, did not render his declarations bearing on the question of undue influence inadmissible as against his co-devisees. *Idem.*923
20. Same.—In a will contest by a disinherited heir of testatrix, in which it was alleged that testatrix's husband exercised undue influence to procure the will, questions to the husband as to whether he had ever said to his wife that one of the contesting heirs was a spendthrift, who would dissipate the property and for her to see that the matter was fixed in such a way that he could not get any part of it, were improperly excluded. *Idem.*924

WRITING—

See Criminal Law, 11. Pledge, 1, 2.

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